

AMERICAN FOREIGN TRADE

As Promoted by the
WEBB-POMERENE and EDGE ACTS

With Historical References
to the
Origin and Enforcement of the Anti-trust Laws

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THIS BOOK IS DEDICATED TO
EDMUND A. WALSH, S. J., Ph. D.,
FIRST REGENT OF THE
SCHOOL OF FOREIGN SERVICE OF GEORGETOWN UNIVERSITY
IN RECOGNITION OF HIS DISTINGUISHED SERVICES
AS PIONEER
IN ORGANIZING THE FIRST DEPARTMENT
OF AN AMERICAN UNIVERSITY
DEVOTED EXCLUSIVELY TO TRAINING MEN
FOR OVERSEAS COMMERCE.

“To cherish and stimulate the activity of the human mind, by multiplying the objects of enterprise, is not among the least considerable of the expedients by which the wealth of a nation may be promoted. * * * Every new scene which is open to the busy nature of man to arouse and exert itself, is the addition of a new energy to the general stock of effort.”

ALEXANDER HAMILTON.

PREFACE

In meeting the new situation that confronts the United States as a leader in world-trade, Congress has made a notable contribution through legislation directed to the promotion of American foreign trade. Two legislative acts in particular stand forth as mile-stones in the advance toward the goal of larger activity in the foreign commerce of the United States, viz., the Export Trade Act (Webb-Pomerene Law) and the Edge Act. These measures demonstrate a national realization of the essential requirements of trade with foreign lands, and denote a fixed determination on the part of our government to protect and foster the efforts of its citizens in their dealings in overseas trade.

These laws are of such tremendous importance that they have aroused widespread interest not only in this country but in foreign lands as well. Many business men already are actively availing themselves of this new trade machinery, while foreign governments, recognizing the merits of our foreign trade policy, are employing it as a model for legislation to accomplish similar ends.

As these laws are of vital interest, an earnest demand has sprung up for information as to their origin, meaning, practical operation and ultimate effect.

Thus far the available information has been scattered, much of it being inaccessible to the business man, the lawyer, librarian, banker, exporter or to the student who plans to enter the foreign service field.

Universities, law schools and schools of commerce, which have instituted courses of foreign trade, have been handicapped by

the lack of a practical and basic guidebook for teachers and students.

To further this purpose and apply underlying principles, the authors have analyzed and discussed many economic, legal and practical business problems that have a bearing on the combination movement both here and abroad.

As a proper background for a clearer understanding of this dominant element in our national trade policy, the underlying facts in the history of monopolies in the United States, of the Sherman Anti-trust Law and legislation supplementary thereto, are presented. They reflect the evolution of public opinion and of the court decisions up to date.

Discussion of the procedure and activities of the Federal Trade Commission is presented; and the methods prescribed for instituting Edge Law Banks are set forth.

Taking up the larger subject of world-trade, the modern problems surrounding private agreements and business corporations, as well as trade practices in international commerce and trade, are examined with special references to their bearing on the industry and trade of the United States. The suppression of unfair competition and unfair trade practices in international trade is being recognized more and more as one of the most important questions of our times. Constructive suggestions for the solution of this question are presented in the hope of furthering progress along these lines.

The book may be helpful to lawyers and business men planning the organization of export associations. For their use, copious examples of charters and agreements, as well as the reprints of official rules, regulations and forms issued by the Federal Government in connection with the Webb-Pomerene and the Edge Acts, have been inserted in the Appendix.

It is hoped that the student of economics will find in these pages a fund of useful and suggestive material, much of which is here published for the first time.

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PART ONE



INTRODUCTION

THE EVOLUTION OF OUR TRADE POLICY

CHAPTER I.

The Evolution of Our Trade Policy.

New Conditions Demand Reconstruction.

The great world war has left our country in the midst of a veritable maelstrom of domestic problems of an economic nature. Some of them are substantially new, others involve old questions in a modern form. All of them press for solution and determination in accordance with the changed conditions created by the gigantic political and economic struggle through which the nations of the world have just passed, and in harmony with the practical needs as well as the ideal aspirations of our nation.

Legal Problems Involved.

Among the old problems which have taken on new aspects and added importance is that surrounding industrial concentration and combination, popularly known as the "trust" problem. For well nigh forty years it has been a burning issue in the legal and economic history of the United States. It has permeated public opinion so strongly that in the course of years a definite national policy has crystallized around it. In order to better understand and gauge its more recent aspects, which reach out into foreign trade and involve international factors, a brief analysis of the past stages in its development seems necessary.

In following up the evolution of this policy from its early beginnings to the present time, we find a number of landmarks standing out very definitely. When during the late seventies

and early eighties of the last century "big business" enterprise, either in the form of combinations, pools, etc., or consolidations, mergers, etc., made its entry into American industrial life and established for itself a position of dominating influence, rapidly approaching monopoly, public opinion became alarmed. Wide-spread hostility to the new "trusts" presently found its expression in repressive state legislation and ultimately, in 1890, in the enactment of the Sherman Anti-trust Law. Opposition to the "trusts" was grounded fundamentally on two principles. The first was voiced by Senator Sherman¹ when he denounced "trusts" as undemocratic, a menace to republican institutions, and inconsistent with our form of government. This argument was based on a political theory as to the best form of government. The second was enunciated by Senator Hoar, when he said "We are dealing with combinations whose only purpose is to extort from the community and apply to individual use, for the purposes of individual greed, wealth which ought properly and lawfully and for the public interest to be generally diffused over the whole community."² This argument was based on an economic theory of distributive justice.

Individual Effort Promoted.

Back of this philosophy was an intense individualism which conceived it a prime duty of the courts to maintain competition. Under a competitive regime, it was assumed, profits and wages would in the long run be not unreasonably high or low, the quality of manufactured goods probably would be improved, and the most efficient business results would be achieved in the struggle between competitors. These motives, quickened by an aroused public conscience which was outraged by an increasing number of gross abuses of power on the part of certain "trusts," combined ultimately in shaping a definite national anti-trust policy. Its fundamental tendency was of a repressive character.

¹See Congressional Record, March 21, 1890.

²See Congressional Record, March 27, 1890.

The legislative department of our government and public opinion were in close accord in this matter.

This was less true of the executive and judicial branches of the nation. Comparatively few prosecutions were undertaken and energetically pushed by the Department of Justice. A list of cases instituted by the United States under the Federal anti-trust laws, from 1889 to 1901, shows the following, viz., during President Harrison's administration (1889-1893), 7 cases; President Cleveland's second administration (1893-1897), 8; President McKinley's administration (1897-1901), 3.

Moreover, the practical application of the national anti-trust policy by the courts during the same decade was slow and hesitating, and on the whole barren in its results. Only gradually did the courts become more responsive to public opinion, and then only after a new stage had been reached in the evolution of the trust problem.

Economic Aspects Win Recognition.

The most characteristic feature of this second stage of our anti-trust policy consists in the emphasis laid on the economic aspects of "big business." An enlightened public had begun to interest itself more and more in the affairs of big business enterprises. With practical sagacity it recognized the fact that the development of combinations is not static but dynamic and saw the need of systematic official studies and investigation and analysis of the "trust" problem. The Industrial Commission and the Bureau of Corporations were in turn established to serve this useful purpose. The publicity given to the investigations and recommendations of these bodies furnished to the public generally statistical material and a wealth of facts for a clearer and more intimate understanding of the economic factors involved in the "trust" problem, and of the activities of these giant agglomerations of business.

Gradually certain economic advantages began to be discerned in the so-called "trusts," which by many were believed to be beneficial not only to business generally but also to the public.

Such questions as low cost of production and distribution, standardization of products, economies in buying, more equal distribution of work, better utilization of by-products, and numerous others, popularly included in the term "efficiency" received more and more attention.

Unfair Competition Injures Trade.

On the other hand, the dangers arising from the existence of great *imperia in imperio* having vast actual power and little tangible responsibility, their weakness and drawbacks, especially under a misguided policy, were brought out much more clearly through comprehensive economic investigations of basic industries by well-equipped government agencies than had been the case in the routine course of trials at court. A forward step of fundamental importance consisted in recognizing as particularly objectionable that whole group of trade practices, not necessarily inherent in "big business" but only too often its attendant barnacles, which are covered by the term "unfair methods of competition." It was felt that to get at the root of the "trust" evil these malignant growths, ever potential of new and perhaps greater dangers to the body politic, must be suppressed and guarded against with the utmost vigilance. In other words, the earlier repressive principle gave way to a policy directing itself more to the prevention of monopolies and towards checking the potentiality of exploitation by big business.

This new orientation of public opinion reflected itself presently in greater activity in trust prosecutions and in a series of court decisions beginning in 1904. During President Roosevelt's administration (1901-1909), 44 cases were instituted by the United States under the Federal anti-trust laws; during President Taft's administration (1909-1913), 80 cases; during President Wilson's administration (1913-1920), 68 cases. This makes a total of 192 cases during this period, over against 18 cases during the first decade following the passage of the Sherman Act. In looking back over these decisions several high points, of fundamental significance, hold our attention. They

found their expression mainly in the Standard Oil and the American Tobacco decisions, rendered in 1911. We note the following:

(1). The doctrine of the "standard of reason" was laid down as a criterion governing the question whether or not a contract, combination or conspiracy is in restraint of trade.

(2). Combinations restraining trade by means of holding companies or by merger of ownership were held unlawful.

(3). Material importance is attached to the existence of unfair practices as evidencing an attempt to monopolize.

(4). Mere size of a corporation or the existence of unexerted power is not an offence in the absence of overt acts.

Application of Sherman Law Broadens.

As we glance over the whole development of judicial interpretation of the Sherman Act, we cannot fail to note a pronounced trend toward an increasingly broader application of its terms. At the same time the net practical results attained during a period of thirty years by prosecution under the Federal anti-trust acts and by action of the courts have been, on the whole, one-sided and have failed to satisfy public opinion. In spite of a mass of litigation, dissolution decrees, fines, etc., the "trust" problem has continued, and the solution reached, primarily through the instrumentality of court decisions and decrees has proved a highly uncertain remedy and not at all satisfactory. Experience showed time and again that situations and conditions growing out of and responsive to great economic laws cannot be met by mere judicial fiat. By slow stages and with a large measure of reluctance, the public mind has reached this conclusion; but the movement, while slow, has been glacier-like in its resistless pressure and its power to overcome every obstacle. The result may be taken henceforth as firmly establishing and making axiomatic the principle that tribunals are wanting in that administrative quality which must be an inherent factor in every public body properly equipped to assume and maintain a policy of constructive reform and of return to correct principles, in

situations where violation of any of those great economic laws is made to appear.

The necessity, under such circumstances, of proceeding by administrative rather than by judicial functions at length has won for it general recognition throughout the United States; while in at least one foreign jurisdiction this conclusion has been reached and the fact has received prominent and authoritative mention. In this connection we quote a statement by a foreign observer which was embodied in the report of the Committee on Trusts¹ of the British Ministry of Reconstruction:

"The conclusion to which competent critics are forced is that anti-combination laws have proved thus far worse than futile. They have produced interminable litigation which has led nowhere; by making combinations of independent manufacturers criminal conspiracies they have encouraged the fusion of firms into great amalgamations; and they have driven combination underground where its worst qualities have thriven and its best qualities declined. It has failed to break up the huge combination which it has itself indirectly promoted, for, as has been said, 'You cannot unscramble eggs;' and it has prevented the realization of the beneficial possibilities which above-board combination holds."

Situation Demands Trade Commission.

Gradually the conviction took root that as the basis of a firm but wisely limited control of monopolistic tendencies in American business, a special official organization should be created. This slowly matured plan culminated in 1914 in the enactment of the Federal Trade Commission Act and the Clayton Act, under which the Federal Trade Commission was established and vested with certain administrative as well as semi-judicial powers. The investigatory functions of the Bureau of Corporations were in somewhat broadened form transferred to the new commission. An outstanding feature of the Federal Trade Commission Act was the prohibition of unfair methods of

¹Great Britain. Ministry of Reconstruction. Report of Committee on Trusts. London, 1919 (Cd. 9236), p. 28.

competition in commerce. Supplementing this broad and elastic provision, the Clayton Act specifically prohibited two kinds of unfair competition, viz., price discrimination and tying contracts, and besides, contains provisions aimed at the abuses growing out of interlocking directorates and of holding companies. In practical operation the Commission has developed essentially along two lines, (1) as a laboratory of applied economics, and (2) as a commerce police or trade umpire.

The creation of the Federal Trade Commission marks the prelude to a new period. This third stage in our national trust policy is still in the formative process. It has shaped itself sufficiently, however, to enable us even now to determine some of its essential features.

Combination Era Makes Demand Imperative.

Unquestionably the consummation of this most recent change is due very largely to a better understanding of the fundamental forces which quicken the economic life of our nation. But it was superinduced and greatly accelerated by the extraordinarily vigorous and far-reaching process of combination which set in during the war and has continued unabated ever since, both in this country and abroad. Under the influence of war conditions trade associations have increased enormously, in no small measure at the instance of government departments. Experience showed that better results could be obtained by dealing with an organized industry or trade than with scattered individual firms. Collective dealing facilitated price-fixing, rationing and joint bidding for government contracts.

Parallel with this movement along co-operative lines there developed a widespread trend towards amalgamations and fusions. Large fortunes made in war industries, greater use of standardization and mass production, the development of entirely new industries, difficulties in getting supplies of raw materials under conditions of increased demand, these and other factors gave impetus to the movement and intensified this process of capitalistic concentration. One result of the war has

been greatly to increase the tendency to combination, and at the same time to give it a more clearly recognized place in our national economy.

It was inevitable that the advantages of collaboration and co-operation experienced under war-time pressure would make for concerted working in the future. More than ever before the whole trend of industry and commerce was directed towards combination. The whole situation had to be met somehow. Efforts to cope with it were not long in the making, but the method of approach was along novel lines. The new industrial and commercial position of the United States as a world power, the broadening-out of our commercial relations beyond national boundaries, called for a readjustment of our national trade policy to fit the new problems that arose in our foreign trade.

Question of Foreign Trade Involved.

As far as the American people were concerned, the "trust" question, prior to the war, was a domestic problem exclusively. It is that no longer. Our commercial relations with foreign nations have undergone a fundamental change during the past five years. Our preeminent position in international trade necessitates that much greater attention than heretofore be given to the foreign aspect of our commercial policy. One of the first things upon which public attention was focused, when the question of foreign trade was thrust into the foreground of national discussion, at the outbreak of the European war and prior to our entry into it, was the competitive conditions obtaining in world trade. It was felt that combinations of foreign producers and organized groups of foreign buyers, as well as concerted action on the part of foreign financial, insurance, shipping and other interests, affected American interests more closely than had been generally realized. Moreover, it was felt that under prevailing conditions the small, individual American manufacturer was at a disadvantage over against his foreign rivals in over-sea markets.

At the same time cognizance was taken of the fact that in the

course of centuries competition in over-sea markets had, as it were by common consent of the leading trading nations of the world, come to be regarded more and more as operating in a non-man's land. Business practices considered unethical and unlawful at home, were not infrequently condoned when a foreigner was the victim or when a foreign country was the field of operation.

These were the principal underlying motives which prompted Congress to enact legislation to meet the needs growing out of our new position in international trade. Two laws were passed to promote the export trade of the United States, the Export Trade Act (Webb-Pomerene Law) in 1918, and the Edge Act in 1920. The Webb law legalizes export associations or combinations which engage solely in exporting goods, wares or merchandise. The Edge Act provides for banking corporations organized for the purpose of engaging in international or foreign banking or other international foreign financial operations. The significant point is that both laws permit the formation of combinations for engaging in foreign trade, and to this extent amend the Sherman and the Clayton laws.

We therefore see here a distinct tendency towards expanding our "trust" policy in accordance with our broadened interests in world trade.

Trade Policy Retains Sherman Law.

Co-operation for selling, as well as for purely financial transactions in foreign markets has been legalized. It does not follow, however, that in so doing the bars of the anti-trust laws have been let down. On the contrary, it is expressly provided in the Webb-Pomerene Act that agreements in export trade which restrain the domestic trade, involve unfair competition, or artificially and intentionally enhance or depress prices within the United States shall not be exempt from the Sherman law. Congress even went much farther than that and extended the scope of the clause against unfair competition, contained in the Federal Trade Commission Act, so as to embrace unfair meth-

ods of competition committed outside of the United States against American competitors by individual American exporters as well as by export associations. This provision of the Webb-Pomerene Act, which gives to that law extra-territorial jurisdiction in cases of unfair competition, represents one of the most noteworthy new departures in our own "trust" policy, if not in the entire realm of commercial legislation of the world. It constitutes a concrete effort to do away with the "double-standard" in world trade and lays the foundation for a new and higher standard which is to govern the international trade practices of the future. It is America's contribution to an upward trend in commercial ethics where "the stranger within (and without) our gates" is the person particularly concerned.

American Export Trade Regulated.

The foregoing qualifications and limitations do not complete the safeguards thrown around export combinations by Congress in its efforts to protect the public interest. A further step was taken and it signifies an additional novelty in our trade policy. The Webb-Pomerene law requires that every export association shall file certain documents with the Federal Trade Commission, and that body is given wide powers of investigation and supervision. The Edge Act, in turn, provides that financial concerns intending to operate under it shall procure a charter from the Federal Reserve Board and operate in accordance with such rules and regulations as that agency may determine under the law. In the one case we have the requirement of a Federal charter, in both cases we find adoption of the principle of Federal supervision of combinations engaged in foreign trade.

At first glance it might appear that these new departures in our national policy towards "big business" were merely transitory measures occasioned by the exigencies of war or reconstruction. But on closer examination we observe essentially the same process of evolution taking place in our policy towards other lines of industrial and commercial enterprise not linked

up with foreign trade. All indications are to the effect that we are dealing with a permanent movement.

The clearest indication of a trend toward modification of our anti-trust policy may be observed in recent Federal legislation relating to transportation, both water and rail. The Act of September 7, 1916, establishing the United States Shipping Board specifically provides in Section 15 that every common carrier by water shall file with the board a statement of all rate, pooling and other agreements with other carriers. The board is authorized to approve or disapprove and cancel such agreements. All agreements shall be unlawful without the approval of the board, and agreements approved by the board shall be excepted from the provisions of the anti-trust laws.

Movement Permeates Transportation Laws.

In the more recent Merchant Marine Act of June 5, 1920, Section 29(b), we find the same policy continued, for among other things this Act provides that associations, pools, combinations or other concerted action of marine insurance companies to transact a marine insurance and reinsurance business in the United States and in foreign countries and to reinsure or otherwise apportion among its membership the risks undertaken by such association or any of its component members,—shall be exempt from the Clayton Act.

Curiously enough, the whole movement has found its strongest expression in recent railway legislation. Railway transportation was the field in which nearly half a century ago the operation of pools, discriminatory rate agreements, etc., first aroused public sentiment and led to repressive legislation. The Federal Transportation Act of February 28, 1920, contains rather elaborate provisions for the consolidation and operation of the railroads of the country in groups, the co-ordination into some twenty systems. It further provides for the probable consolidation of the large express companies, and greatly enlarges the supervisory and controlling powers of the Interstate Commerce Commission.

If we now regard the Webb-Pomerene, the Edge, the Shipping Board, the Transportation and the Merchant Marine Acts as a whole, we cannot fail to recognize a consistent policy running through this whole body of recent commercial and industrial legislation. This policy, as we have observed, was first applied by Congress to our foreign trade. It has been continued in dealing with problems belonging more strictly to our domestic economy. Its essential features consist in a broadening of the Sherman anti-trust law so as to legalize combination within a limited sphere, placing, however, each alliance of formerly competing interests under strict government supervision and control.

Private Ownership Retained.

While nationalization has been suggested as a practicable recourse, it cannot be said that its advocates have succeeded in impressing their views upon our people in such a way as to make it an issue of national scope. In European countries and elsewhere, where the war and its consequences have accelerated this movement towards nationalization of industry and trade, certain motives, among them fiscal reasons which do not exist in this country, prompted such action.

While the aforementioned developments stand out with sufficient distinctness in our domestic and foreign trade to enable us to discern their essential characteristics, there are other forces at play which as yet are less clearly defined. Their probable bearing on our "trust" policy can only be conjectured at this stage.

International Combinations Affect Foreign Trade.

We observed above how some of our recent commercial legislation has been predicated on our newly extended foreign trade relations. We also noted how this new orientation of our national interests and aspirations left its impress on our anti-trust laws. If appearances deceive not we are on the eve of

far-reaching new problems, having on the one hand to do with international combines and on the other hand with large individual concerns of a super-national and monopolistic character.

In the past public attention in this country has not concerned itself appreciably with world "trusts" and world monopolies. They played a more important role in the trade policies of European countries. Prior to the war German industrial organization held the leadership in the sphere of international cartels. What its component units lacked in size and capital was made up by means of co-operative organization, which linked together German, Austrian, Belgian, French, Italian, British and other competitors in a given industry, and united them for the purposes of price agreements, division of territory, exchange of patents, etc. These international commercial phalanxes formed a sort of counter-balance over against large individual capitalistic concerns, chiefly American corporations. In some instances agreements and understandings were reached between the two rival parties.

The political and economic collapse of the central European powers, and the weakened condition of French, Belgian and Italian industrial power, caused the breakdown of most of the former international cartels. This in turn has shifted the center of influence over into the camp of the large American and British corporations and companies. However, numerous factors make it probable, if not inevitable, that sooner or later the disrupted trade alliances among European business interests will again be reestablished, probably under French leadership. It seems equally reasonable to assume that in view of the greatly intensified intra-national combination movement, the international combines of the future will exercise a more dominating influence in the commercial arena of the world than their predecessors.

World-trade Combinations Concern American Interests.

A further point worth considering is the fact that heretofore international combines embraced chiefly European parties.

During the past decade Japan, Australia and New Zealand, and several Latin-American countries have witnessed a rapid growth of the combination movement. It is quite probable that the business interests of these countries will in the future align themselves more or less closely with foreign groups and ententes. In fact, the beginning has already been made.

While on the whole American firms have up to the present time not participated to any appreciable extent in such international private agreements, there is reason to believe that we are entering upon an era where greater co-operation with foreign combines will appeal to large and powerful circles of our community. Aside from all other considerations, the rapidly proceeding penetration of foreign industries and enterprises by American capital promises to develop into an element of decisive importance in shaping our future policy in this matter.

Suggestion of International Trade Commission.

But the question of international agreements or combinations is only one side of the foreign aspect of the "trust" question that confronts us in its new form. A somewhat different phase relates to the numerous individual concerns in various countries whose business activities encircle the globe, and which include manufacturing and merchandising houses as well as international financing and promoting concerns. The enormous agglomerations of wealth at the disposal of some of these concerns, their dominant control over a large part of some of the world's most important raw materials and of channels of distribution and communication have become more generally known during the world war. These enterprises offer a problem which concerns not any one country alone. It touches vital interests of many nations. This fact has been officially recognized by a number of committees in foreign countries which have studied the subject, and they all agree that the question of the control of international trade by private interests is eminently one for international action. Insofar as this subject has been given atten-

tion in our country up to this time the consensus of opinion appears to favor action through an international trade commission.

Domestic Policy Advocates Regulated Competition.

To sum up, the question of monopoly has engaged the attention of statesmen and philosophers as far back as the Ancient Orient. The old problem in new surroundings has now been an issue of vital political and economic significance in the United States for one generation. As we look back over this span of thirty years and observe a democratic people wrestling with this one of the problems so fundamental to human society, the gradual crystallization of a trade policy appears before our eyes. Starting out with a negative and repressive legal attitude toward big business, there followed a period of observation and of closer study of economic forces underlying our industrial structure. It led to stricter supervision and regulation through semi-judicial governmental agencies, especially established for this purpose, vested with preventive and corrective powers exercised to a large extent through publicity. Out of the world war new situations arose with a corresponding amplification of our "trust" policy. For the first time the influence of our foreign relations brings itself to bear on our national trade policy and culminates in legislation permitting combination, but in limited form and under government supervision.

Such, in brief, are the milestones in the evolution of a question which is presented in its various aspects and in detailed form in the following chapters.

PART TWO

ORIGIN AND ENFORCEMENT OF AMERICAN ANTI-TRUST LAWS

CHAPTER II.

Development of Monopolies in the United States.

Incubation of Trusts.

The history of private, capitalistic, business monopoly in the United States is coincident with our transition from an agricultural to a manufacturing and industrial nation. In the absence of an extensive manufacturing industry and of adequate transportation facilities, industrial combination was of no paramount importance up to the second half of the 19th century.

Special Privileges Not Favored in America.

In the early history of our country no small prejudice existed against privileged and monopolistic companies as a result of the experiences with such concerns in England. In connection with the ratification of the Federal Constitution the subject of mercantile monopolies came to the foreground. On motion of Samuel Adams the Massachusetts ratifying convention voted to recommend as an amendment "That Congress erect no company of merchants with exclusive advantages of commerce." Similar recommendations were adopted by the conventions of New York, New Hampshire, North Carolina and Rhode Island. However, when the matter was taken up in Congress, in August and September 1789 and again in 1793, it did not come to a vote.

The popular and deep-rooted opposition to large-scale corporations with wide powers expressed itself again when on November 22, 1791 the legislature of New Jersey passed an act incorporating "The Society for Establishing Useful Manufac-

tures." It was commonly known as the "S. U. M.", and was one of the pioneer industrial corporations of the United States. It was promoted by Alexander Hamilton, the Federal Secretary of the Treasury, contemporaneously with his famous Report on Manufactures, in which he advocated the encouragement of domestic industries so as to make the United States independent of other nations in this respect.¹ The protests against the S. U. M., as a legal monopoly with objectionable exclusive privileges, on the part of small-scale producers, who believed their economic existence endangered, and the bitter press controversy which ensued, stirred up considerable excitement in those days. It also proved a strong factor in quickening the prejudice which had already existed previously and which, as stated above, was a result of the traditional antipathy to British monopolistic corporations. In the popular mind "corporations promoted the concentration of wealth and were distinctly dangerous to a democracy."

In course of time, as more experience with actual corporations accumulated, hostility and criticism grew less pronounced. They began to center more around sporadic cases of price agreements among Eastern manufacturers and similar artificial restraints of trade of a more local character among merchants.

Civil War Era Breeds Trusts.

One of the outstanding features of the great economic change which followed the civil war was the development of big business. The remarkable growth of railroad transportation, supplemented by the facilities of inland waterways in the Middle West and coastwise shipping along the Atlantic and Pacific seabords, offered the means for business expansion over a wider territory. At the same time it was possible to localize and centralize manufacturing enterprises and to establish an efficient machinery for large-scale production and distribution under a centralized control. The increased use of machinery in manufacturing, stan-

¹Davies, J. S. Essays in the earlier history of American corporations, 1917.

standardized methods of production, uniform accounting methods and the installation of such technical facilities for speedy transaction of business as the telegraph, telephone and typewriter furnish, gave additional impetus to the tendency toward concentration of management and resulting enlargement of the size of the business unit.

American Business Adopts Corporate Forms.

In the history of the industrial combination movement in the United States the corporate form of business organization occupies an important place. The flexible form and perpetual life of the modern corporation, together with the advantages of joint-stock ownership and limited liability, combined to make this form of business organization the most adaptable and suitable for large-scale business enterprises. The corporation has become typical of organized industry in the United States. Primarily under this form of associated action, the modern American captain of industry has succeeded in building up those gigantic capitalistic business concerns, popularly known as "trusts," which constitute one of the most significant features of our industrial history during the past forty years.

The growth in the number of corporations and the magnitude of the business of the country conducted by corporations is indicated by the following figures. For the fiscal year ending June 30th, 1911, 270,202 corporations of all kinds paid a tax on net incomes aggregating \$3,360,000,000. Their combined capital stock totaled \$57,886,000,000 and their aggregate bonded and other indebtedness was \$30,715,000,000.

Development of the Industrial Combination.

The evolution towards industrial combination in the United States is marked by a series of distinct stages. Its earliest forms consisted in price agreements among independent concerns. In the American railway business and in the anthracite coal mining industry arrangements of this nature were effected.

Division of territory, as in the case of American express com-

panies, signified a further step. A third phase in the movement to restrict competition consisted in agreements to restrict the output rather than the price or the territory—in the form of the so-called "pool." Under this device the receipts were put into a common fund or pool. The whiskey pool attained a considerable degree of notoriety in its days.

A further phase of the concentration movement consisted in the formation of a central selling agency which served as a sort of clearing house for the members of the agreement, fixed prices, and prorated output. The Michigan Salt Association belonged to this category.

The aforementioned schemes, however, did not satisfy the aspirations of the pioneers of American "big business" organization. The instability of these arrangements, the absence of adequate power to prevent underselling, efforts covertly or openly to secure greater profits by exceeding the allotment, etc., only too often proved the weakness of these attempts at cooperative restriction of competition.

Industrial Organization Seeks Centralized Control.

A greater degree of centralized control over the individual establishments as well as over the whole combination was deemed desirable and in the "trust" form of industrial organization a vehicle was found which was believed to meet these requirements. The first industrial trust formed in the United States was the Standard Oil Company of Ohio (see also page 36) which represented a combination of thirty separate companies whose stocks were turned over to three trustees under a trust agreement in 1879. In 1882 the old agreement was superseded by a more elaborate one. It was a combination of oil refineries in Ohio, Pennsylvania and New York, whose stock was assigned to a board of nine trustees, in exchange for trust certificates. The entire management of the business was controlled by the trustees. The term "trust" has subsequently been used in a popular sense as a designation for all industrial combinations, even though their form of organization was not that of a trust in the strict meaning of the term.

The example of the Standard Oil Company was followed by the sugar refiners and the whiskey distillers in 1887 and still later by the principal manufacturers of tobacco, salt, cotton-seed oil, steel, tin plate, etc.

American Public Opposes Centralization.

In the meantime, opposition on the part of the American public to this new form of business monopoly had begun to crystallize and found its culmination in suits against the Sugar Trust in New York in 1890 and against the Standard Oil Trust in Ohio in 1892. As a result of the court decisions holding both trusts to be illegal, the original trusts were dissolved, but only in a legal sense, for the combinations continued under other forms. The Sugar Trust reorganized as the American Sugar Refining Company, under the laws of New Jersey. This single corporation absorbed the several member concerns which had formed the original trust. The Standard Oil Trust reorganized along different lines. A holding company, the Standard Oil Company of New Jersey, was formed. These two types of big business organization—the single corporation, owning outright the properties controlled, and the holding company—have in course of time become the usual forms of trust organizations.

Culmination of Trust Movement.

The year 1898 marks the turning point in the history of the American trust movement. Up to that time the progress of consolidation was slow, approximately eighty-two combinations, with a total capital exceeding \$1,000,000,000, having been organized. In the period from 1898 to 1901, however, such a sudden activity developed in the formation of new trusts that that period has come to be known as the "consolidation craze." The

following list contains the leading industrial consolidations formed during that period.¹

1898

American Thread Co.	American Linseed Co.
International Paper Co.	American Tin Plate Co.
United States Envelope Co.	National Biscuit Co.
Federal Steel Co.	International Silver Co.

1899

Amalgamated Copper Co.	American Steel & Wire Co.
American Smelting & Refining Co.	National Tube Co.
American Hide & Leather Co.	American Steel Hoop Co.
American Woolen Co.	American Window Glass Co.
American Felt Co.	American Writing Paper Co.
American Agricultural Chemical Co.	Distilling Co. of America
Royal Baking Powder Co.	U. S. Cast Iron Pipe & Foundry Co.
American Ice Co.	Bordens Condensed Milk Co.
United Shoe Machinery Co.	National Enameling & Stamping Co.
United Fruit Co.	Union Bag & Paper Co.
American Shipbuilding Co.	Standard Oil Co. of New Jersey
American Car & Foundry Co.	American Chicle Co.
National Steel Co.	International Steam Pump Co.

1900

American Sheet Steel Co.	American Bridge Co.
Crucible Steel Co. of America	American Snuff Co.

1901

International Salt Co.	United States Steel Corporation
American Can Co.	Eastman Kodak Co.
Consolidated Tobacco Co.	American Locomotive Co.

The wave of business prosperity which swept over the country at that time unquestionably constituted one of the principal factors which contributed to this remarkable trust movement. Other favorable circumstances, however, affected the organization of trusts materially. Professional promoters and speculators seized upon the opportunity to unload industrial securities upon a public anxious to invest their savings. During the preceding four years of business depression relentless competition had led many to incline to the view that "competition is

¹See U. S. Bureau of Corporations Trust laws and unfair competition. Washington, G. P. O., 1916, p. 12 fol.

the death of trade." The benefits of industrial combination now appeared to many in a rosy light. The wide publicity given to the remarkable success of certain trusts met a ready response on the part of the investing public. Over six billion dollars' worth of securities was marketed by the new industrial trusts before the movement spent itself.

Questionable and fraudulent financiering coupled with numerous other disappointing results like high prices, etc., contributed to disillusionize the public, and a strong reaction set in throughout the country against the so-called "trust-evils."

LAWS AGAINST MONOPOLIES AND TRUSTS.

The more or less isolated life and almost complete industrial independence of the early American colonists, as well as of the sturdy pioneers and farmers who at a later period built up our vast western territories, produced in the American people a strongly developed sense of individualism. This jealousy of one's rights and independence did not fail to leave its impress upon our industrial and commercial life. It manifests itself in our system of individual activity and free contract, and was an essential factor in establishing the popular belief in freedom of competition which became so firmly rooted in the American mind. Consistent with this attitude, public opinion showed itself strongly opposed to monopolistic practices, whenever they appeared.

This traditional view of the American people concerning monopolies found a welcome support in the common law, under which monopolies are unlawful because of their restrictions upon individual freedom of contract and their injury to the public. Intentional and undue enhancement of prices of the necessities of life was by common law considered to constitute unlawful restriction of the freedom of the individual, and a contract of an individual unreasonably restraining his own trade or business was void. At the common law this was treated as coming within "monopoly," and monopoly was generally considered as being in restraint of trade.¹

¹See Chief Justice White in the *Standard Oil Case*, 221 U. S. 51-55.

Court Rulings Under Common Law.

A considerable number of cases involving agreements in restraint of trade have been decided by courts in the United States under the common law.¹ In the absence of special anti-trust laws in certain states or where such statutes have proved ineffective or inapplicable, or as in Massachusetts where they are expressly declaratory of the common law, the latter has served as the legal basis for prosecution of industrial monopolies. The leading common law decisions involve three groups of agreements:² First, such by which the vendor of a business agrees not to reengage in the business as a competitor of the purchaser. The second group comprises agreements to regulate competition among trade rivals who continue as such subject to the restrictions of the agreement. The third group relates to agreements by which ownership or control of competing business is combined in the same hands.

The decisions of the courts under the common law did not prove an effective check upon the growth of monopolistic practices and agreements. Industrial combinations grew in number and size in spite of their supposed illegality under the common law and notwithstanding that under the constitutions of several states they had been declared unlawful. Finally, in the eighties, when public opinion became more and more aroused and hostile to the new form of business organization represented by the trusts, the legislatures of several states enacted statutes prohibiting trusts and other combinations in restraint of trade or leading to monopoly. During the year 1889 anti-trust laws were passed in Maine, Michigan, Tennessee and Texas, and in the following year in Iowa and Kentucky. In the course of time thirty-two states and two territories passed such laws.

Attempts to remedy the trust evil by state legislation encountered numerous obstacles. As a consequence of the interstate commerce clause of the Federal Constitution and the interpreta-

¹U. S. Bur. of Corporations. Trust laws and unfair competition, op. cit., p. 24 fol.

²U. S. Bur. of Corporations. Trust laws and unfair competition, op. cit., p. 25.

tion given it by the Supreme Court, effective control of the trusts through state legislation was rendered futile. While the states have power to control intra-state commerce, they have no right to interfere with any interstate commerce in which manufacturing corporations may be engaged. The loose corporation laws of Maine, Delaware, New Jersey and West Virginia, which states either failed to enact anti-trust legislation or deliberately liberalized the same, and where most of the trusts were incorporated, thwarted the anti-trust movement throughout the country. The fact that these "charter granting" states afforded an asylum to trusts and by so doing made the people throughout the country largely helpless victims, accentuated the need of Federal repressive legislation.

The Interstate Commerce Act of 1887, which prohibited pools among railroads, served as a precedent for congressional action against restraints of commerce and trade. Public opinion insisted on further legislation by Congress with the result that the Sherman Anti-trust Act was enacted in 1890. The passage of this law marks the most important step in legislation for the suppression of industrial monopolies in the United States during the nineteenth century. This act registered the formulation and initiation of a national policy calculated to suppress combinations in restraint of trade. It was not, however, until two decades later, that the Sherman Anti-trust law was brought to a searching test and its significance demonstrated.

In the meantime the American public had come to realize that the problem of industrial combinations involved not exclusively legal but also economic questions. The latter began to be placed more in the foreground through investigations and official reports on the economic structure and operation of trusts.

Trust Problem Investigated.

In 1898 Congress created the United States Industrial Commission for the purpose of investigating among other industrial problems the growth of large corporations and trusts. The

report of the Commission focused public attention upon the size and power as well as on some of the excesses of trusts, especially in relation to stockwatering, promotion profits and unfair competition. Largely as a result of the Commission's work the Bureau of Corporations was organized in 1903 under the Department of Commerce and Labor.

The chief function for which the Bureau was created was to furnish information to the government for purposes of legislation in connection with corporations and combinations. The various investigations conducted by the Bureau and its reports were a potent influence in the successful prosecution by the Department of Justice of several anti-trust suits, were instrumental in bringing about needed legislation and above all proved of valuable service in furnishing accurate information to the public with regard to some of the most important industrial combinations. The helpful service of the Bureau led Congress, in 1914, to create the Federal Trade Commission into which the Bureau of Corporations was merged.

CHAPTER III.

Legal Measures for Suppressing Trusts, Culminating in The Sherman Anti-trust Act.

Sherman Law and Other Anti-trust Laws. The Occasion for Their Enactment; The Advantages to the People Which Have Accrued Therefrom, And the Likelihood of Present or Future Need for Such Protective Legislation.

Monopolies and engrossing (as the practice is styled in English law) are features of communal life which date back to the earliest dawn of history; they are the veritable offspring of human selfishness and greed.

History Discloses Trade Monopolies.

While records are not altogether wanting of oppressive combinations in control of staple articles of human supplies in ancient and medieval times, the rights pertaining to kingcraft and the other forms of government then in force differ so greatly from the constitutional forms now in almost universal use throughout the civilized world, that we shall find it most convenient and useful to direct our attention to those examples which modern history affords. One exception, however, exists; and the student of history quickly discovers that in England alone the traditional rights of the subject in King Alfred's reign have survived and form the bedrock of the common and statute laws under which the commonwealth of Great Britain is governed today.

Initial English Decision is Ruling Authority.

By common consent, the judicial ruling in *Darcy v. Allen*,¹ is esteemed the original "anti-trust" decision. Despite its antiquity, (it was decided in 1602), that case is still much cited; indeed, it is discussed in nearly every recent opinion which deals at all extensively with monopolies and trusts. Feeling ourselves justified by the important place it occupies in our description of the Sherman Act and the other anti-trust laws, we shall not apologize for a somewhat extended treatment of that notable ruling and of the parties to that historic suit.

By consulting the quaintly termed record of those early court proceedings we learn that Edward Darcy, a courtier and groom of the privy chamber to Queen Elizabeth, brought suit against one T. Allen, a haberdasher of London, alleging as his grievance that, whereas the making of playing cards was a useless occupation and whereas by maintaining the price at a low level, "card playing was become more frequent, and especially among servants and apprentices and poor artificers; and to the end her subjects might employ themselves to more lawful and necessary trades," therefore, the Queen "intending that her subjects being able men to exercise husbandry, should apply themselves thereto"—had granted to the plaintiff a monopoly of importing or manufacturing playing cards for a term of twenty-one years. The complaint further sets forth that the defendant "without the Queen's license, or the plaintiff's, caused to be made eighty grosses of playing cards" which he had "sold and uttered to sundry persons unknown," and asks damages.

The defendant Allen, in answer, alleges that he was a merchant of London and was entitled to buy and sell unhindered by royal restriction or grants.

To this answer the plaintiff demurred; but the demurrer was not sustained; and in its ruling holding the plaintiff's monopoly to be against the public interest and unenforceable, the court says that monopolies are universally characterized by the fol-

¹11 Coke 84.

lowing incidents, which indicate their injurious effect upon the public welfare:

"(a) That the price of the same commodity will be raised; for he who has the sole selling of any commodity may and will make the price as he chooses.

"(b) That after the monopoly granted, the commodity is not so good and merchantable as it was before, for the patentee, having the sole trade, regards only his private benefit and not the commonwealth.

"(c) It tends to the impoverishment of divers artificers and others who before by the labor of their hands in their art or trade, had maintained themselves and their families who now will of necessity be constrained to live in idleness and beggary."

Mentally the Tudors were no whit better equipped than their successors in the Stuart dynasty; but politically the former were much more pliant and conciliatory. It was accordingly given out that grants of monopolies would cease; that they originated under the mistaken belief that they would benefit the commonwealth; and that the Monarch fully recognized the injury such restrictions occasioned in interfering with or altogether suppressing traffic in important commodities forming part of the trade of his realm.

. *Darcy v. Allen* Declarative of Anti-trust Doctrine.

The case of *Darcy v. Allen* established or rather, proclaimed the English doctrine regarding restraints of commerce; and while doubtless there have been periods of infraction, these lapses are only exceptions—for more than three centuries the salutary rule discountenancing and penalizing monopolies and trade restraints has remained unchanged. Indeed, it would be difficult to frame, even at this late day, a better arraignment of trusts and monopolies; and there exists no abler statement of the dire results than is contained in that old-time suit brought by a courtier against a merchant, to enforce a private grant of exclusive rights in trade.

In the United States we find very few court cases dealing with monopolies or trade-restraints, down to the period of the Civil War. Presumably, the country was so amply endowed with natural resources that the majority of citizens had at their command the things essential to the support of life; and assuming this to be so, our domestic corporations, even if they could assemble capital sufficient to monopolize household necessities, did not have a sufficient inducement to enter the field of trade-restraint, had they been so inclined at the Civil War period.

Monopolies Follow in Wake of Civil War.

With cessation of that internecine conflict, the situation changed radically and immediately. Thousands of able officers, released from active service at the very prime of life, sought occupation and wealth by prospecting and exploration and in the further development of established industries. Hundreds of thousands of soldiers, duly discharged upon the disbanding of the Union and Confederate armies, hastened to join in the search for profitable employment. Amid such auspicious circumstances it was a natural and easy matter to organize companies, regiments and even armies of efficient workmen from the supply of willing labor so opportunely at command. Capital doubled and quadrupled in marvelous fashion; and increasing capital plus abundant labor equalled great prosperity—to express the post-bellum conditions in arithmetical terms.

Centralizing Influence Strongest in Oil Industry.

In one department of domestic industry, amid feverish excitement, this era of prosperity developed rapidly and to a phenomenal extent. Certainly no other field experienced a greater impetus than that connected with the discovery, production and marketing of natural oil. At one blow the development of the petroleum industry extinguished the fleet of whalers that formerly departed day by day from New Bedford to visit the farthest seas. It was obviously wasted effort to voyage abroad for an article which was flowing from the soil at home.

The discovery of natural oil was destined to rank among the most potent factors in this great and immediate increase in our national wealth. Standard Oil capital was early in the field, engaged in assembling a corps of picked men, equipped with skill and experience in that line, with intent to preempt and exploit the entire industry, with cynical disregard for public interests and for any private interests except their own. Powerful opponents contested the control of the oil fields; but business ability of a high order coupled with willingness to employ propaganda, spying and other devices that display a degree of cunning that would be esteemed "unfair competition" today, enabled the Rockefeller organization to achieve a complete victory over every opponent. While the situation at that time appeared mysterious, subsequent investigations have disclosed the secret of the means by which success was obtained; and it is now known to have been a case of brass knuckles against bare fists.

In an epochal opinion, Chief Justice White, in the greatest of all anti-trust cases, has taken occasion thus to describe and characterize the national impulse which at length resulted in the adoption of adequate protective measures by way of Federal anti-trust laws:

"* * * the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combinations which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally."

Any impartial student of those times will discover that the persons in control of the Standard Oil Company's interests were the pioneers in the "trust" field, and that their vast measure of success stimulated and encouraged similar practices in numerous industrial fields; so that we shall pursue a natural course if we economize time by centering our attention upon this shin-

ing example of "trust" methods, during the period when it was engaged in securing virtual control of an important industry.

Evolution of Standard Oil Company.

The oil industry was in its infancy in 1865, when John D. Rockefeller began in a small way to refine oil at Cleveland, Ohio. The original difficulty lay in refining the oil; but by superior efficiency he and certain associates succeeded in establishing a business that produced four per cent of all the oil refined.

The business of oil-refining had gradually become standardized; and the principal advantage thereafter to be secured consisted in obtaining cheaper transportation to market. The New York Central, the Erie and the Pennsylvania railroads had severally secured entrance into the oil fields; but the roads were poor, and a great struggle ensued to obtain freights in volume sufficient to pay current expenses and provide for needed extensions. Meanwhile, in the oil industry of Pennsylvania, competition had also been keen. All but fifteen of the refining companies had been obliged to sell out or to close down. By this time, however, the Standard Oil interests had grown to such size that they were the largest in the field; and were in a position to compel the railroads to compete for the traffic they had to offer.

In May, 1871, there was organized the South Improvement Company, an operating concern in which John D. Rockefeller and his associates were large stockholders, and which it was generally assumed represented the Standard Oil interests. In January, 1872, the South Improvement Company entered into an agreement with the Pennsylvania, Erie and New York Central railroads, (the principal oil-carriers), by which it allotted the oil at its command for transportation over those roads in agreed proportions, and in return received the following concessions:

First: A rebate upon *all* oil transported whether furnished by itself or by its competitors.

Second: All other customers must pay full rates.

Third: Waybills of all shipments by competitors must be supplied to it, and,

Fourth: The promise of the railroads to maintain the business of the South Company against loss or injury by competition, and to that end to lower or raise the gross rates to such extent as should be necessary to overcome all competition.

The railroads reserved the right to grant the same terms to any other patron which should furnish equal transportation business, with equal facilities for promoting the oil-trade; but since there was no other concern in that class, the offer was obviously a mere sham and pretense, intended to varnish over this most unfair transaction with an appearance of respectability.

Upon the date (February 27, 1872) when the contract went into effect, popular judgment was evidenced by mass meetings in the petroleum centers. On March 15 a resolution was introduced in the House of Representatives at Washington to investigate the South Improvement Company. On March 25 the railroads publicly abrogated the contract; and on April 6 the Pennsylvania legislature repealed the charter. The fact remains, however, that persons prominently identified with Standard Oil interests owned 900 out of its 2,000 shares; and it is not improbable allotments of the remaining shares of capital stock were distributed among the officials of the three railroads concerned in this scheme.

Secret Dealings with Transportation Companies.

Practically all the investigators and writers who have probed into the phenomenal rise of the Standard Oil Company have agreed that somewhat later this inequitable and nefarious contract (by secret means) was renewed with the Standard Oil alliance which was then forming. At least two of the magnates in charge of the oil-carrying railroads suddenly rose to great wealth; and no funds corresponding to those enormous rebates and concealed profits provided for in the South Improvement Company deal ever found their way into the exchequers of the New York Central, Pennsylvania or Erie railways. In the opinion of the business world of those times, the Standard Oil principals were clearly masters of the situation. The Hepburn Committee of the New York Legislature when probing the oil situation in

1879 elicited this remark from William H. Vanderbilt, president of the Central system: "I think they are smarter fellows than I am, a good deal."

Leaving moral considerations out of the calculation, the transaction reflects credit upon the loyalty and business acumen of the management of the Standard Oil Company. They, at least, made a profitable bargain and did not discriminate against their own people; whereas, in the case of the transportation lines, the public which had given to those corporations valuable charters and grants of various kinds in numerous ways was militated against or ignored, and the stockholders had just reason to complain of conditions under which (as the testimony before the Hepburn Committee showed) oil was transported to the sea coast "for less than the cost of the axle grease!" The tyranny of such conditions, however, at length aroused the independent spirit of President Scott of the Pennsylvania Railroad, and he determined to free his transit system from the entangling alliance. In a desperate effort at one blow to crush the entire Standard Oil combination he reduced the carrying charges of oil for all shippers to eight cents less than cost and arranged with competitors to sell oil in Standard Oil territory for any price the market should offer.

Pennsylvania Railroad Sues for Peace Terms.

But this supreme effort was ineffectual against the massed forces which the oil magnates had at command. Their agreement, whatever its nature, with the Erie and New York Central railroads and their complete system of refineries and pipe lines were factors too strong to overcome; and at the end of a bitter contest extending over six months the Pennsylvania was forced to acknowledge itself beaten, to request an armistice and to sue for terms. This took place in October, 1877, and, when the smoke of battle cleared away, the Standard Oil interests came forth with the record of having in seven years increased from a concern controlling four per cent of the refined oil out-

put, into one controlling ninety-five per cent, a virtual monopoly of the production and transportation of oil in the United States.

Stages of Standard Oil Development.

Less dramatic but not without interest for us here is the account of the successive stages by which the Standard Oil concern progressed from a mere association to a great corporation with enterprises and fleets encircling the globe.

Let us now consider the three forms under which this great company existed and through which its business developed:

First: In the inception of its career, the business of the Standard Oil interests was conducted by an "alliance" or "pool;" and this with little or no interference with the management of the constituent members. But such an arrangement proved too loosely constructed for employment when the business had grown to large proportions. The price could not conveniently be regulated, or output lessened at will; and a closer combination seemed necessary to effectuate the common purpose.

Second: "Trust Agreements" were originated and put into operation by John D. Rockefeller and his associates in 1882; and this new type of association was the earliest attempt in the United States to give legal and binding effect to the unenforceable agreements embodied in the "alliance" or "pool." It is a device that has since lent its technical name to an entire class of industrial combinations.

The machinery of the "trust" centered in a board of nine trustees, who took over from the various owners either the absolute control or the voting power of their several stock holdings. In return for, or rather in acknowledgment of these assignments, the trustees issued to the transferers—that, is, to the true owners—"trust certificates" representing the valuations of the several plants. Except for the qualifying shares of the directors of the various corporations, these trust officers could vote all the shares; and even this loophole was closed when the new instrument of business control was brought into complete working order by the election of these same trustees to fill the positions of directors upon the boards of the constituent concerns. The

plan worked to perfection; indeed, it cannot be denied that the device displayed the acme of legal ingenuity applied to corporate control. Not only were dividends turned over to the trustees as custodians of the common fund—these revenues were “pooled;” and in this way every owner of a “trust certificate” shared proportionately in the net profits derived from each and all of the component members of the aggregate enterprise.

Thus it automatically transpired that plants could be shut down or dismantled and others erected at strategic points without hardship to the owners of the particular enterprise thereby discarded; for the owners of “trust certificates” were entitled to an aliquot division of the usufruct resulting from the operation in the entirety of this dominant factor in the petroleum industry, which was beginning already to take on a world-wide aspect. Acting through its absolute control of the various directorates, the power of the central “trust” was no longer persuasive only; it possessed the legal right to enforce its commands within the organization; and all this was accomplished with a secrecy unknown since the days of the Venetian doges. Success in harmonizing divergent interests was immediately apparent; and the Standard Oil enterprises advanced by leaps and bounds in a manner that amazed the business world of those days.

As an observant writer has said in words that are not too strong for the situation—these business conceptions, i. e., the Standard Oil “trusts,” were “permanent in organization, centralized in government, responsible and representative.”

In one respect, however, the policy of this gigantic combination was calculated to excite public fear and resentment. It was an axiom in the system of operation as laid down by John D. Rockefeller that “the Standard Oil should pay tribute to no man;” and by degrees factories were established where its own barrels were manufactured, and these were carried to the seaboard on its own cars, and the oil was ultimately delivered at domestic ports and abroad in its own vessels. The American people were becoming thoroughly alarmed and aroused. In brief, the situation had become too acute to be of long duration.

By the year 1890, sixteen states had declared “trust agree-

ments" illegal and unenforceable within their several jurisdictions. In that year, too, Congress arose in its wrath and might, and by the enactment of that drastic measure known as the Sherman Anti-trust Act completed the demolition of this skillfully devised fabric. In New York, the Sugar Refineries Company, (an understudy of that example of joint control), was by the State Supreme Court declared to constitute an illicit exercise of corporate powers and its charter was revoked by judicial decree; and two years later, in 1892, the same fate overtook the Standard Oil "trust" at the suit of the people in the Supreme Court of Ohio, the seat of its local habitation and corporate home.

Third: There remained, however, one form of control which promised permanency for the Standard Oil interests and purposes; and this their counsel proceeded to work out and apply in a masterful manner. The plan thus formulated called for an incorporated body domiciled in some favorable jurisdiction; and the surrender to it of the holdings of the great majority of the shares of capital stock.

So worked the legal mind; and a new creation, the "holding company," was created in further proof that "necessity is," indeed, "the mother of invention."

A period of comparative quiet ensued. By the medium of this well-thought-out expedient the "Standard Oil Company of New Jersey," there was provided a convenient receptacle into which to deposit the permanent control of the various companies comprising the "trust." However, the American public was not convinced this change of form signified a change of objective or of methods; and through a federal investigation the affairs of the Standard Oil interests were again made the object of scrutiny of the public authorities. In the opinion of the Department of Justice sufficient facts were elicited to justify a prosecution in the Federal Courts under the provisions of the Sherman Anti-trust Act, with the result that methods adopted and practiced since the period of the institution of the South Improvement Company in the year 1872 were condemned by the unanimous decision of the United States Supreme Court.

By decree of the Supreme Court entered in 1912, the Standard Oil interests were broken up into their component units.

Initial Anti-trust Law Considered.

Having followed the career of the Standard Oil Company, (as an example of methods employed in the formation and maintenance of "trusts"), and having traced its progress from a small beginning to its present position as one of the dominating factors in world commerce—let us now transfer our attention to the equally interesting subject of the legislative antidote and corrective which Congress provided in its effort to cure or at least to check trade-restraining practices.

The tendency toward centralization was spreading rapidly during the period immediately prior to the enactment of the Sherman Law, July 2, 1890. When the bill was before the Senate, Senator Sherman described the "trust" as "a new form of combination * * * that seems to avoid competition by combining the controlling corporations, partnerships and individuals engaged in the same business and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman or a president * * *." Such a combination is far more dangerous than any heretofore invented." Senator Vest of Missouri, in his address before the Senate, declared: "No one can exaggerate the importance of the question, or the intensity of the feeling which exists in the country in regard to it."

In the House of Representatives, Mr. Taylor, member from Ohio and chairman of the Committee on the Judiciary, had this to say: "I am opposed to trusts, foreign and domestic; they toil not, neither do they spin, and yet they accumulate their numberless millions from the toil of others. They lay burdens, but bear none." Then, to emphasize his remarks by an illustration, he continued—in words which seem prophetic of the language employed by the Federal Trade Commission in its "Report on the Meat-packing Industry," June 24, 1919: "The beef trust fixes arbitrarily the daily price of cattle, from which there is no appeal, for there is no other market. The farmers

get from one-third to one-half of the former price of their cattle, and yet beef is as costly as ever. Even if the conscience of the retailer is touched and he reduces the price, the trust steps on him and refuses to sell to him or undersells him 'till he is ruined.' " (Walker's History of the Sherman Law, pages 13, 14, 16 and 38.)

Imperative Need for National Legislation.

It was indeed time for Congress to act. As a writer of that period remarked: "In three years, 1898-1900, one hundred and forty-nine large combinations, with a total capitalization of \$3,578,650,000 were formed. Hardly an industry has escaped consolidation. Coal-mining, iron and steel, copper, lead, zinc, and silver, paper, leather, rubber, salt, starch, chemicals, cordage, ice, glass, paving and roofing, practically all of the great industries whose product is used in further production, have been in large part consolidated."

Although the trusts were able to continue their careers and even to flourish and enlist recruits during the decade following the debate which we have referred to and the anti-trust legislation which resulted therefrom—yet the duration of the trust-era was drawing to a close. It required some years for the Department of Justice to become accustomed to the new weapon Congress had provided; but in the end it proved efficacious in producing a far-reaching reform.

Common Law Inadequate.

By the common law of England and the United States "monopolies" are a crime; but the criminal side of the common law takes no cognizance of the lesser degree of trade-control inherent in "restraints of trade." To reach these offenders there was framed a brief mandatory formula of sound business morals; and this was adopted and duly inscribed upon the pages of our statute laws. In brief, Congress created a new crime when it enacted

THE SHERMAN ANTI-TRUST LAW.

This statute is among the shortest of the Federal statutes. It consists of less than 1,000 words. The bill was originally drafted by Senator Sherman; but was withdrawn during debate, and was rewritten by Senator Hoar. It was passed without further change; has never been amended; has stood repeatedly the acid test of scrutiny by the United States Supreme Court; and in each instance its constitutionality and its general soundness have been confirmed. After debate by perhaps the most brilliant group of Senators which ever assembled in our Upper House, it was passed unanimously by that body, except for one adverse vote by a Senator from New Jersey—a state that derived great revenues from taxes upon the corporations which had been encouraged to locate there, and, indeed, at that period, was not infrequently mentioned as “The Home of Trusts.” Obviously, there was involved a conflict between corporate and public interests; and it speaks volumes for the soundness of American institutions that the combined efforts of the “trusts” were unable to control more than a single vote. Be that as it may—the House of Representatives was even more emphatic in its approval; not one dissenting voice was heard when the roll of its members was called.

Analysis of Statute.

By referring to the text of the statute (Exhibit 1, page 405), it will be observed that it consists of eight sections: Sections 1 and 2 are usually construed together; and it is apparent upon the face of the statute that in plain and terse language of the most comprehensive grasp, contracts and combinations in restraint of trade, together with monopolies, are made illegal and all persons concerned therein are subjected to imprisonment and fine. Upon the face of the text, the provisions of Section 1 are particularly directed against joint endeavors in way of trade-restraints; in Section 2 it is obvious that the offending monopolistic acts may be done by a person operating singly; but when the two sections are construed together, it is apparent

that, like the gigantic shears in some steel works, they cut in pieces everything that comes between. Section 3 makes the law operative in the District of Columbia and in the various territories, as well as in commerce flowing to, from or between those several jurisdictions. By the provisions of Section 4 the Circuit Courts of the United States are clothed with authority to enjoin each and all these illicit acts; and it is made the duty of the District Attorney located in each district to see that the law is enforced. By construction this section has been limited in scope to restraining orders founded upon petitions prepared and filed by the respective District Attorneys in the public interest, so that anti-trust cases came in time to take on somewhat the nature of "state prosecution;" but while this construction prevents private persons from instituting injunction suits in Anti-trust cases, few, if any, instances have occurred where a worthy cause was denied a judicial hearing. The rights conferred by Section 4 are a great step forward; and much benefit has been derived from the knowledge that acts of oppression may be suppressed. Section 5 provides that, when instituted, prosecutions may be extended to bringing into the case parties residing elsewhere in the United States. Section 6 emphasizes the punitive quality of this drastic law, which was made "to fit the crime," and the time. It may be of interest to state, however, that there is no record of any actual condemnation of property by the means here provided. Actions for three-fold damages may be brought under Section 7; while by Section 8 corporations as well as individuals are included in the terms "person" or "persons."

Such is the Sherman Anti-trust Law.

When the bill was before the Senate, the necessity for exercising supreme skill in its preparation was emphasized by Senator Vest of Missouri: "This bill, if it becomes a law, must go through the crucible of a legal criticism which will avail itself of the highest legal talent throughout the entire Union. It will go through a furnace not seven times, but ~~seventy~~ times heated."

In connection with this prediction by Senator Vest, it is interesting to note how, at a later stage, when the bill had become law, leaders of the American bar at frequent intervals have made earnest efforts to detect some defect in its composition; but it has stood the severe test of thirty years of fairly constant professional investigation and analysis.

Conservative Interests Welcome Restraining Influence of Sherman Act.

Of late years, American business men very generally have accepted the provisions of the Sherman Law as the "law of the land;" and have sought to live up to its requirements in spirit as well as in conformity with its legal terms.

Fortunately for all concerned, there is in existence machinery for applying the anti-trust laws in a modified form; and it is ready to hand. We shall dwell upon this theme in subsequent chapters.

But before dismissing the subject of trusts and monopolies, some study must be given to leading cases which will always occupy an important place in our jurisprudence.

CHAPTER IV.

Anti-trust Cases.

Common Law Precedents Confined to State Courts.

It is a well-known principle of American jurisprudence that although the states have inherited the right to proceed under the authority of the common law as laid down in the English cases, Federal courts must follow and apply equitable principles or statute law. Proceeding by the light and under the authority of the common law, (which, as we have seen in our last chapter, takes cognizance only of trade-restraints which have risen to the magnitude of monopolies), certain of the state courts just prior to the enactment of the Sherman Law rendered decisions that in effect belong in the line of anti-trust cases.

Leading Common Law Cases.

Thus, *Richardson v. Buhl*, usually styled "*The Diamond Match Case*," (77 Mich. 632, 6 L. R. A. 457), has a unique interest for us because its authority may be denominated (for want of a better term) a negative-affirmation of anti-trust principles. The facts disclosed by the record display a situation where the parties had agreed among themselves to stifle competition by acquiring and dismantling manufacturing plants that were formerly in active competition, and in other instances to reduce the output by exercising a corrupt influence over factory managers. When the principals fell out, the Michigan court refused to exercise its powers in aid of enforcement of the agreement; and the parties were left to "fry in their own fat," if we may borrow an apt but inelegant expression much employed by diplomatists. This case serves a useful purpose by "brand-

ing" monopolists and treating them as outlaws and refusing to recognize their illegitimate schemes.

At the very time when the Sherman Law was in the forming and Congress was acquainting itself with "trusts," and the various forms of restraints and monopolies, the State of New York instituted civil proceedings and by a series of affirmative rulings extending from the trial court to its Court of Appeals, exercised very effectively powers which the states possess under the common law. This series of rulings is both interesting and important; and coming as it did upon the very threshold of Federal legislation, we feel justified in stating the essential facts, with a brief outline of the decision itself.

The North River Refining Company entered a pool which included eighteen sugar plants. The plan adopted was rather crude, and operated principally through the nomination and election of the directors from a list by the pool-managers. Proceeding upon the theory that the statutory requirements as to dissolution were prohibitory of attempts to maintain a separate corporate existence while surrendering every essential of independent action in protecting or promoting its own interests and proceeding upon its own initiative, the State's Attorney brought suit for the forfeiture of the franchise. The court found (*People v. North River Refining Company*, 54 Hun 354, affirmed 121 N. Y. 582), that the defendant had surrendered its corporate powers by entering into what, in practical effect, was a permanent pool.

The court held:

First: Every incorporated body owes to the state of its creation a certain measure of service, or at least of obedience. Failure to comply with these implied conditions attached to the franchise entails for the offending corporation forfeiture of the charter and dissolution of the business.

Second: As between the State and the corporation, the gist of the inquiry is—"What has been accomplished by the collective action and agency of the officers and stockholders?"

Third: It is an act at once unlawful and injurious to the public interests for a corporation to consummate a merger in a

manner unauthorized by law; and this is equally illicit whether wrought directly or through the indirect medium of a "trust."

Fourth: Corporate grants are always assumed to have been conferred for the public benefit; whereas conduct that prevents free exercise of those corporate functions operates unfavorably to the public interests.

Fifth: That the fact of the merger having been convincingly proven, such a consolidation was (a) in excess of the corporate powers (*ultra vires*), (b) illegal, and (c) called for a decree of dissolution of the corporation and forfeiture of its franchise.

We have dealt with this case at considerable length because it indicates a road to trust-control through the instrumentality of state courts operating under the common law or by enforcement of state laws. Probably, as a general proposition, the trusts were too extensive in their scope to be dealt with effectually by courts whose jurisdiction was confined within the boundaries of a single state. Whatever the cause, the heavy task of curbing monopolies and restoring freedom in trade was assumed and maintained almost entirely through the departmental machinery of the United States Government. Practically all subsequent anti-trust cases were conducted in the Federal courts, under direction of the Attorney General.

Initial Sherman Law Ruling.

The earliest of the Federal anti-trust cases, *American Biscuit & Manufacturing Company v. Klotz* (44 Fed. 721), was not instituted with intent to construe or to enforce the provisions of the Sherman Anti-trust Law. The facts are unique and excite our interest.

It appears that in May, 1890, the "Bakeries Trust," after absorbing thirty-five leading establishments in twelve different states, purchased and took over the defendant's plant and business, and, "trust" fashion, engaged him to remain as manager at a large salary. Wearying of the deal, the defendant repudiated it and undertook to rescind the entire transaction, tendered back the purchase price, or at least the shares of stock in the "trust," and after tearing down the plaintiff's sign, resumed

business as before the transfer. This summary termination of the existing relationship was not unnaturally treated by the "Bakeries Trust" as an act of rebellion, and resulted in a declaration of war and a suit in the Circuit Court of the United States for the Eastern District of Louisiana. The defendant, resisting an application by the Biscuit Company for an accounting and receiver, set up, *First*, An allegation of fraud, coupled with prayer for rescission of the contract, and, *Second*, A further allegation to the effect that (a) the plaintiff was a "trust," (b) the contract was illegal under the provisions of Sections 1 and 2 of the Sherman Anti-trust Act, and (c) being such a contract, could not be enforced through the machinery of a Federal Court.

When deciding the case, the court remarked upon the unusual spectacle of a party coming before it to deny the title of his principal, evidenced by an executed document of transfer in due legal form, which upon its face was a binding instrument until adjudged fraudulent and void, and abrogated by judicial decree. Under ordinary circumstances it was held there could be no question as to plaintiff's right both to an accounting and to a receivership pending trial; but in view of the provisions of the Sherman Anti-trust Act the court held that equity could not lend its aid in making effective a trade-restraining compact; and the application was denied.

In arriving at this decision the court *per curiam* says it is not uninfluenced by certain elements of a general character:

"The attempt to accumulate in the hands of a single organization the business of supplying bread itself to so large a proportion of the poor, as well as the rich people of the United States should not be favored by a court of equity. It carries with it too much of danger of excluding healthy competition, thereby increasing the difficulty to the general public of participating in a most useful business, as well as adding to the possibility of multitudes of citizens being, temporarily at least, compelled to pay an arbitrary and high price for food."

Judicial Reasoning of Early English Case is Identical.

Perhaps it is superfluous to call attention to the close analogy between the language here employed by a circuit court of the United States in the year 1891, and the very similar language employed by the English court in that basic anti-monopoly case, *Darcy v. Allen*, decided in the year 1602. (See page 32.) Nor need we dwell upon the fact that the earliest English authority and the initial Federal anti-trust case each deals with monopolies and their attendant dangers in the same spirit and with like results.

While numerous cases decided under the Sherman Anti-trust Law center in and draw their vitality from the decision which decreed dissolution for the Addystone Pipe and Steel Combination, (175 U. S. 211), it must not be forgotten that this ruling appeared nearly a decade after the enactment of that epochal statute, and that "much water had run through the mill" during the intervening nine years. The Addystone decision occupies a controlling position among the early anti-trust cases; but we must defer consideration thereof until a later place (see page 56).

Department of Justice Prosecutes Under Sherman Law.

The first suit¹ (1891) filed by the government under the Sherman Law was directed against the combination of certain coal mining companies operating from Nashville, Tennessee; and the Federal court decreed a discontinuance of the trade-restraining compact. No appeal was taken; and the government scored an initial success in its anti-trust campaign.

Government Defeated in Early Cases.

The next attack was directed against the "Whiskey Trust," operating as the Distilling and Cattle Feeding Company. Organized in 1887, this industrial concentration was among the largest of the early "trusts," and comprised seventy-two distilling companies, of which sixty were discontinued and dismantled. It operated under the familiar "trustee" device, the

¹United States v. Jellico Mountain Coal & Coke Co., 46 Fed. 432.

system of control at one period employed by the Standard Oil Combination (see page 39). Suit was filed in 1892; but when the formal proceedings were quashed, the government lost interest, and the prosecution was not renewed. However, this "trust" had internal weaknesses that militated against it and prevented a prolonged existence. Financial difficulties led to its self-elimination and dissolution in the year 1896.

Last and perhaps most important of the three premier anti-trust suits was the *National Cash Register Company* case, in the year 1893. This virtual monopoly appears to have surpassed all other "trusts" in cynical disregard of the "rules of the game;" and wilful disarrangement of rivals' machines at competitive trials was one of the offenses with which it stood charged. A control extending to 83 per cent of the cash register business had been attained in 1893, when the Department of Justice proceeded against the officers of the company, under the provisions of the Sherman Anti-trust Law. Although these unfair methods were enjoined in a subsequent prosecution, (201 Fed. Rep. 699)—when an astute advisor so manipulated the situation that the complaining witness transferred its property rights to the defendants and became a part of the combination itself, it followed inevitably that the initial proceeding was doomed to languish and expire.

The record of this second defeat by the government at the outset of its anti-trust campaign, appears at length in the reported cases, (55 Fed. Rep. 641).

Notable Sugar Case Instituted.

The first anti-trust case passed upon and decided by the Supreme Court was instituted in 1894. Two years prior thereto, the American Sugar Refining Company had absorbed all but five of the sugar refineries of the United States—often paying enormous sums, when acquiring and eliminating competition at a fictitious valuation. Of the five remaining plants with a capacity representing 33 per cent of the sugar-refining industry, four were located in Philadelphia, the largest of these being the E. C. Knight Company.

When, by spectacular "trust" methods, surrender and absorption of these independent units was assured, the sugar combination became vested with control of 98 per cent of the output, although at a cost indicated by the increase of the combination's capital stock from \$50,000,000 to \$75,000,000. Increased cost to consumers, without apparent justification in trade conditions, considered in conjunction with intimidating practices connected with elimination of competing interests, led to institution of a prosecution under the provisions of the anti-trust statute.

Supreme Court Adopts Narrow Construction.

Unfortunately for the upbuilding and growth of a general confidence and belief in the effectiveness of Sherman Law, the decision in the *Knight Case* proceeded along narrow lines; and while the decree has never been directly overruled, its prestige and legal authority has been impaired and gradually whittled away by subsequent Supreme Court rulings. Indeed, its present-day value consists mainly as a marker to show how swiftly and how far American jurisprudence has advanced in its anti-trust aspects since the rendition of the decision in the Sugar Trust prosecution. It need hardly be said this advancement has been in the direction of conserving competitive conditions in the precincts of American trade. There were three phases of the Sugar Trust decision (commonly styled the "*Knight Case*").

First: Upon the question of fact, the Supreme Court declared the defendants had created a monopoly of the sugar industry.

Second: That notwithstanding the condition so established by defendants, the case must fail because the Sherman Law did not grant to courts a broad, general power to "deal with monopoly directly as such" i. e., with a monopoly which did not pertain to commerce.

Third: That manufacture was not commerce; and that the acquisition of additional sugar refineries under the condition and in the mandatory manner charged, did not constitute a statutory offense.

Dissenting Opinion Presents Existing Anti-trust Doctrine.

Justice Harlan wrote a vigorous dissenting opinion. He argued that the purchase of raw material and the production of a finished product with intent to transport same into other states for sale and ultimate consumption, constituted interstate commerce; and that the process of purchase of raw material, manufacture and transportation, and the sale of the finished product in other states constituted one transaction in law as in fact; that both upon the facts and the law the Knight case came fully within the prohibitions of the Sherman Law. Needless to say, the reasoning of the dissenting opinion becomes increasingly convincing with the passing years; and it is now regarded as axiomatic that "commerce" includes manufacture, where the product naturally or necessarily becomes absorbed in the general current of interstate trade. As already mentioned, the failure of the case against the Sugar Trust materially weakened the effective working of the anti-trust machinery provided by the Sherman Law; and the effort to curb and remove monopolies grew slack, for a season. Indeed, it was in reliance upon the majority ruling in the Knight case that numerous subsequently created monopolies were reared; and business interests were to some extent excusable when they applied that ruling as their standard, whenever opportunities for trade-restraining combinations occurred.

Accordingly, the example and influence of the Knight decision bred future "trusts;" and in that respect and to that extent, the case is justly regarded as occupying a unique position among the earlier decisions in the line of anti-trust cases.

Extent of Patent Rights Judicially Determined.

In passing, it might be well to mention the *National Harrow Cases* (67 Fed. 130; 74 Fed. 443; 76 Fed. 667; 83 Fed. 226), wherein it was held that the Federal courts would take notice of illegal schemes to monopolize manufacture and to raise prices through the medium of acquiring all patent rights in a particular

field of trade; in such instances courts would adopt a narrow construction of the contract in conformity with the spirit of the Sherman Law; and would refuse to apply the trade-restraining provisions of the compact.

Transportation Interests Prosecuted Under Anti-trust Law.

The Freight Association Cases (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505), are of extreme importance because they establish: *First*, Railroads are within the purview of the anti-trust statute; *Second*, A valid agreement which was entered into prior to the date of enactment of a Federal statute may become thereafter an illegal compact; *Third*, The plea that unrestricted competition might destroy the weaker members does not legalize an association otherwise illicit in its nature and ends.

In one respect, however, these cases have been greatly modified through later rulings. The literal construction adopted and applied in the *Rate Cases*, (as they are commonly styled), was doubtless too burdensome for practical application. To say that every combination which possesses the power to monopolize becomes an outlaw concern and must be dissolved regardless of its convenience to the public or to the trade, or of the other benefits it confers—is an interpretation which is harsh and inequitable in its application to human affairs; and removes from the court that discretionary power which is its highest function. It is the monopolistic act or the restraining influence upon interstate commerce which is the essence of the infraction; and to declare every association or combination illegal merely upon proof that such concern is capable of employment to bring about an unlawful end, is a perversion of language; and such method of enforcement is a far journey from the purpose of Congress in providing a ready means for removing abuses which, as we have seen, were especially rampant at the period centering about 1890, the date of the enactment of the Sherman Act. To illustrate our meaning by reference to the affairs of every-day life

—the original ruling in the *Rate Cases* resembles the act of a farmer who cuts down his healthy orchard for fear at some future harvest season his trees might yield imperfect fruit. Under such a construction, the old adage becomes inverted; and our laws would provide that ten innocent men should suffer rather than that one guilty person should escape.

Rate Case Decision Modified.

Chief Justice White in express terms revised the ruling in the *Rate Cases* when writing the opinion in the Standard Oil case; and as the matter now stands, the anti-trust act applies only to offenders who, in the light of reason, are seen to be actually effectuating or intending to create a virtual monopoly or trade-restraint. In all other respects the judicial reasoning and the conclusions so ably set forth in those cases have stood the test of experience; and when regarded with proper allowance for this single defect, they mark a long forward step in the anti-trust campaign. However, railways have been so completely subjected to the scrutinizing eye of the Interstate Commerce Commission that it does not appear probable monopolistic tendencies can proceed to great lengths in that quarter.

To demonstrate the importance of the *Rate Cases* and the power of the interests which were compelled to recognize and conform to the provisions of the anti-trust statute, we have only to mention the fact that the original combination (Trans-Missouri Freight Association) comprised eighteen railroads; while in its reorganized form (Joint Traffic Association) the combination had thirty-one railways as participants. In each instance the dissolution of the combination was decreed.

The Addystone Prosecution—A Leading Anti-trust Case.

We now come to the Addystone Case, (*United States v. Addystone Pipe and Steel Company*, 85 Fed. 271), which, like a veritable light house, operates to guide us through the mazes of the anti-trust decisions. It reflects great credit upon its author, and may be said to be the crowning effort of the eleven years

point to a positive prohibiting statute; and such legislation differed materially in the several states.

Government Wins Favorable Decision in Appellate Court.

Be that as it may, in the *Addystone Case* the prayer for a preliminary injunction was denied in the trial court; but upon appeal, Judge Taft, when delivering the opinion of the Circuit Court of Appeals, took occasion to declare the conduct of the defendant a direct violation of the anti-trust statute. He held contracts which operate as a restraint upon the soliciting of orders for, and the sale of, goods manufactured or stored in one state to be delivered in another, are contracts in restraint of interstate commerce, and are illegal acts within the meaning of the Sherman Law. This was the first instance where the question of dealings originating in one state and consummated by delivery in another, received judicial notice and construction in the light of the anti-trust statute; and we cannot fail to observe the masterful grasp with which Judge Taft deals with the subject. The principle that interstate commerce includes the soliciting of orders in one state for delivery in another is amply demonstrated; and, basing his conclusion upon that solid foundation, he expresses the judicial conclusion: "If, then, the soliciting of orders for, and the sale of, goods in one state to be delivered from another state, is interstate commerce in its strictest and highest sense—such that the states are excluded by the Federal constitution from a right to regulate or tax the same—it seems clear that contracts in restraint of such solicitations, negotiations and sales are restraints of interstate commerce. * * * We can see no escape from the conclusion, therefore, that the contract of the defendants was in restraint of interstate commerce."

Judge Taft then proceeds to interpret and construe the only really formidable authority in contravention of his position that contracts which stopped business at its source might amount to infractions of the anti-trust laws. He handles the subject firmly and successfully—just as canny Scots are said to grasp

the thistles that generously adorn their heaths and mountain wilds!

Addystone Case Effectually Nullifies Knight Case.

Of course, the authority to which we allude is the *Knight Case* (for summary, see page 53), which had been decided only four years, and was not yet whittled down by narrow constructions and judicial encroachments from divers directions. In his Addystone opinion, Judge Taft analyzes Chief Justice Fuller's opinion in that case, and dismisses it from further consideration as turning upon quite another question—"The distinction between a restraint of business of manufacturing and a restraint upon the trade or commerce between the states in the article after manufacture." In brief, the weakness of the reasoning in the *Knight Case* does not escape him; and he refuses to give it a value which is entirely beyond its importance as a contribution to the anti-trust department of American jurisprudence. The wonder remains how in three successive courts that over-refined distinction could have prevailed; and how Federal judges up to and including the Supreme Court could have been seduced by the vain desire to divorce manufacture from commerce in a situation where the two factors are inseparably intertwined.

Further Analysis of Addystone Ruling.

But to return to our consideration of the notable Addystone opinion, in his peroration Judge Taft declares: "We do not announce any new doctrine in holding either that contracts and negotiations for the sale of merchandise to be delivered across state lines are interstate commerce * * *, or that burdens or restraints upon such commerce Congress may pass appropriate legislation to prevent, and courts of the United States may in proper proceedings enjoin * * *. If this extends federal jurisdiction into fields not before occupied by the general government, it is not because such jurisdiction is not within the limits allowed by the constitution of the United States."

Dealing, in conclusion, with the prayer for confiscation of the defendant's property in process of transit between the states, under Section 6 of the anti-trust act, Judge Taft refuses that form of relief, holding that the statute contemplates condemnation upon the law side of the court, in proceedings specially and specifically directed to that end. The main purpose of the suit, however, is given effect by a decree perpetually enjoining the defendants from continuing to combine in their dealings in cast-iron pipe, or from doing any business under the illegalized association. The opinion in the *Addystone Case* displays in logical sequence the chain of reasoning by which the judicial mind reached a conclusion which is convincing and at the same time is completely destructive of a cunningly devised scheme. In addition to this, Judge Taft's clear and comprehensive review of the field of English and American anti-monopoly and trade-protection cases, taken together, constitutes a graphic and substantially complete history of that branch of jurisprudence down to 1898—the date of this memorable decision. As an exemplification of completeness and of employment of the judicial ability to analyze and to differentiate between opposing arguments, the *Addystone* opinion is a close competitor of the opinion by Chief Justice White in the *Standard Oil* case. The latter ruling is one to which we will direct attention briefly, at a somewhat later place (page 66).

Government Attacks Meat-packers' Trust.

In 1903, some five years subsequent to the *Addystone Case*, suit was brought under the Sherman Law against the "Beef Trust" (*United States v. Swift & Company and others*, 122 Fed. 529), charging that the agreement between the defendants: (a) to refrain from bidding against each other in the purchase of cattle; (b) to create artificial prices to stimulate shipments, with the intention to cease from bidding and to lower prices when the shipments arrived; and (c) to ultimately fix prices and restrict quantities of meat shipped by themselves to their agents or customers,—amounted in effect to an unlawful combination in restraint of trade. Seven corporations, one partnership and

twenty-three individuals were included in this "round-up" of alleged offenders against the anti-trust laws. Federal Judge Grosscup, Circuit Judge for the Northern District of Illinois, found for the government; and his decree granting an injunction was sustained upon appeal to the Supreme Court (196 U. S. 375). The tendency to enlarge the scope and effectiveness of the statute by a broad definition of "commerce" is seen in the meaning here attributed to that term. Judge Grosscup asserts that: "It includes the intercourse—all the initiatory and intervening acts, instrumentalities and dealings—that directly bring about the sale or exchange. Thus, though the sale or exchange is a commercial act, so also is the solicitation of the drummer, whose occupation it is to bring about the sale or exchange * * *. The whole transaction from initiation to culmination is commerce."

Court's Ruling Broadens Scope of Anti-trust Prosecutions.

The defendants contended that in numerous instances the cattle were purchased in the state of the initial shipment; so that the cattle had already become the property of the defendants when, in course of transit to their ultimate place of destination they actually became an element in interstate trade. This distinction was brushed aside by the trial judge, in whose opinion the cattle were in process of being sent to market for distribution as beef; and the sale in transit was held to be a mere incident in the entire transaction.

The "Beef Trust" case is important not only because it subjects an important and vital industry to the scrutiny of the Federal courts and negatives monopolistic practices, but also because—as we have seen—it enlarges the scope of the anti-trust laws and assists in making them fit the exigencies of each particular case.

The Northern Securities Case—A Controlling Anti-trust Decision.

Proceeding in order of time, we now arrive at the year 1904, and find before us the record of the Northern Securities case,

(*Northern Securities Company v. United States*, 193 U. S. 197), which continues the doctrine of the *Rate Cases*, and applies the same reasoning and reaches the same conclusion in a situation where the combination discards the machinery of a rate-fixing association and assumes to place the actual ownership of the stock, or of the controlling interest therein, in the permanent custodianship of a holding company.

It is, of course, obvious that (in 1904) the "trust" idea has ripened and advanced to the stage of full fruition; also that the principals are not daunted by the effort and investment of capital required for the transfer of entire railway systems to their favorite device, the holding company, with the expectation that the plea of possession and full proprietorship will operate as a complete defense—should the government invoke the aid of the anti-trust statute to restore the competitive relation previously existing. In effect, it is a battle of Holding Company against Sherman Anti-trust Act—with powerful banking interests serving as "shock regiments" on the side of the assailants.

The project is unique in its boldness of conception; so far as our observation extends, no other private transaction presents items of equal magnitude in railroad finance; and we may perhaps be pardoned if we digress somewhat at this point, rather than pass abruptly to consideration of the exact question at issue here, when a topic of surpassing interest lies almost directly in our pathway.

Remarkable Alignment of Railway Interests.

For some years prior to 1901, two railways, the Great Northern Railway and the Northern Pacific Railway, had been engaged in building up a great interstate and Oriental traffic. In April of that year they bought nearly the entire capital stock of the Burlington System at a cost of over \$200,000,000, paying for such stock with their joint bonds. Immediately afterward a "raid" was organized and carried into effect by the Union Pacific interests—in other words, by Mr. Harriman, operating in its behalf—to prevent the consummation of the deal, and, particu-

larly, to negative participation therein on the part of the Burlington System. The "raid" failed, largely because the attacking interests miscalculated by investing in common instead of preferred shares.

There was always present, however, the possibility of a renewed assault by Mr. Harriman; and like other good generals, his adversary, Mr. Hill, in conjunction with ten leading stockholders who composed his headquarters staff, determined to entrench; and this defensive measure took on the form of the Northern Securities Company, provided with a New Jersey charter of the approved holding corporation type, and fully equipped to operate as permanent custodian of the control. Soon after its organization the Securities Company took over the Northern Pacific shares concerned in the "raid," namely, (in round numbers) \$37,000,000 common and \$41,000,000 preferred, at a lump price of \$91,000,000, of which nearly \$9,000,000 was paid in cash and approximately \$82,500,000 in shares of the Securities Company at par. Prior to the commencement of the government suit in March, 1902, the Securities Company had become the owner and holder of \$152,000,000 of the total \$155,000,000 stock of the Northern Pacific Railway. During the same period, that is to say, between November, 1901, when the Securities Company was organized, and March, 1902, the date of the commencement of the government suit—the Securities Company had acquired 95 millions of holdings out of 125 millions comprising the total capital stock of the Great Northern Railway. The price fixed for the latter shares was \$180, as against \$115 for Northern Pacific shares.

Influential Group of Financiers Concerned.

This gigantic enterprise, demanding qualities composed in about equal parts of railway strategy and banking finesse, had the support of the Morgan concern; and its members were active promoters thereof, even if they had not (as many persons believed) contributed the original idea. The holding company was intended to enlarge the railroads' spheres of influence by pro-

viding left-hand means of acquiring the ownership of coal mines and other adjacent properties which the railways were not empowered to hold; and by co-operation as a financial as well as industrial company, to aid in the transit companies' operations. That the holding company plan was not distasteful to the stockholders themselves is seen by the fact that at or about the time when the government suit was begun, March, 1902, 1,200 out of 1,800 stockholders of the Great Northern transferred their holdings and became, by exchange of stock, owners of proportionate interests in the Securities Company.

Grounds of Defense.

These facts were abundantly proven, in fact were admitted by the parties defendant; but they alleged, in answer to the government charge of a monopoly and restraint of interstate trade:

First: The institution of the holding company and the exchange of shares had overcome the fear of adverse "raids."

Second: The acquisition of the Burlington System had materially enlarged the connections of the associated railways.

Third: The advantage of this change was seen in greatly increased interstate commerce over their lines.

Fourth: Rates had been substantially reduced.

Fifth: The internal management of the several railways was not interfered with.

Sixth: In view of these beneficial results, and of the prevailing factor that the Sherman Anti-trust Act is a criminal and not a civil statute, no case was shown for interference by the Federal courts.

Holding Company Dissolved by Supreme Court Decree.

When the issues involved in this momentous case were brought before it upon appeal, the United States Supreme Court held that neither the correctness of the motives of the promoters nor the benefits resulting from the enterprise as a whole could remove the taint that permeated a transaction where interstate trade and commerce were restrained. The act of placing more

than nine-tenths of the Northern Pacific stock and more than three-fourths of the shares of the Great Northern Railway in the hands of an incorporated custodian, from the judicial standpoint necessarily caused a cessation of competition in lines extending from the Great Lakes and the Mississippi River to Puget Sound; in fact, it was further held, the plan in its practical effect amounted to a virtual consolidation. In consequence of these acts—so reasoned the Supreme Court—the arrangement became an illegal combination in restraint of trade; and the court enjoined the holding company from voting any of the shares of stock thus acquired and restrained the railways from paying dividends to the holding company.

Wall Street financial circles regarded the Securities Company's position as invincible and current stock quotations disclose how completely those interested "discounted" the assumed certainty of the government's defeat. For those interests the Supreme Court's ruling descended like a tornado from a clear sky.

Decision a Landmark in Anti-trust Cases.

But this epochal decision went further than the mere illegalizing of the particular transaction; it attacked and overthrew the favorite device of the trust-promoting class; and the whole fabric of holding companies as a means for placing the stock-control beyond the reach of the law was shattered and fell to the ground. In fact the ire of the Supreme Court decision delivered by Mr. Justice Harlan, was particularly directed against "the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce." Mr. Justice Brewer, while concurring in the general result, took occasion to modify his position in the *Rate Cases* (see page 55), by declaring that, as to them, he preferred placing the court's decision therein upon the ground that those traffic associations being monopolies, came within the prohibited class; and he desired to retract his former ruling that *all* restraints were *per se* infractions of the anti-trust law.

It is interesting to note how closely this Sherman Law decision follows the lines of the earlier cases decided in accordance with the rules of the common law; and this similarity is clearly disclosed by reference to the decision in the *North River Refining Company Case*, (page 48). In both instances it transpired that the law would not brook a permanent separation of the ownership from the management in corporate enterprises.

Government Proceeds Against Standard Oil Company.

In the years immediately following the *Northern Securities Case*, death had been an influential if silent factor in the contest between the people and the trusts. The minority element of the Supreme Court had been swelled by new appointments; and their spokesman had been elevated to the Chief Justiceship. It was, therefore, before a court with what upon the surface appeared a more promising complexion, that the defendants in the Oil case presented their plea at the time of argument, March, 1910, and of the reargument in the following January. The opinion was handed down in May, 1911.

This notable anti-trust appeal involved the Standard Oil Company of New Jersey and 33 other corporations, with John D. Rockefeller, William Rockefeller and five other individuals as joint defendants. The lower Federal court supported the contention of the government.

Summary of Charges Against Defendants.

The catalogue of charges, condensed by Chief Justice White from the 57 pages of allegations contained in the government's complaint, is as follows:

"Rebates, preferences and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of

bogus independent companies and payment of rebates on oil, with the like intent; the division of the United States into districts and the limiting of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely destroyed"—ending with an allegation of the "enormous and unreasonable profits," which from the government's point of view, afforded an indication of the scope and power of the offending organization.

Trial Court Renders Decision Favorable to Government.

Upon the evidence adduced, a decision had been rendered in favor of the United States by a trial court consisting of four Federal judges. It was based entirely, that court said, upon acts of wrong-doing alleged to have been committed since the passage of the Anti-trust Act, July, 1890. Other proofs were considered only as evidence of the defendants' "continuing conduct and of its effect." Thirty-eight corporate and individual defendants were included in the judgment, which enjoined the Standard Oil Company of New Jersey from voting the stock of its subsidiaries or exerting any control over their affairs; and the subsidiaries were likewise enjoined from paying dividends to or accepting direction from the parent company; while the several individual defendants were restrained from entering into or carrying on any like combination with intent of evading obedience to the decree; and, out of abundant caution, the Standard Oil interests were prohibited from engaging in interstate commerce in petroleum or its products during the continuance of the illegal combination.

Supreme Court Affirms by Notable Decree.

Upon the final review (221 U. S. 1), the decision of the Supreme Court was rendered in an exhaustive opinion by Chief Justice White, holding that freedom to contract is the essence of freedom from an undue restraint of commerce; and that the guilt of the defendants was sustained by ample proof. He elected to base his decision upon the convincing nature of the evidence when "viewed in the light of reason," and refused to

accept as all-inclusive those broad terms of the statute prohibiting "every" contract and "every" combination in restraint of trade. While concurring in the essential points of the opinion-in-chief, Justice Harlan, in a separate opinion, took occasion to express his dissent as to the road by which that conclusion is reached, and contended in vigorous terms for a literal construction of the anti-trust statute; but in view of the fact that such a construction would potentially invalidate every innocent absorption of a competing interest, the argument presented in the opinion of the Presiding Justice seems more sound and therefore more convincing. It certainly contains the elements of practicality; and thus is in conformity with common experience and common sense.

Except in minor particulars, the decree of the trial court was affirmed. Under the revised decree some measure of competition between the various units comprised in the former combination was provided for; and government regulation was required as a condition precedent to continuing the business. Reform of Standard Oil practices, however, has been entirely external—that is to say, no expression of regret was expected (certainly none has been publicly expressed) from that quarter; but while there is no surface indication of actual competition *inter se*, the plan now in force has proved effective in permitting independent concerns to participate without material hindrance in the business and profits of the petroleum trade.

American Tobacco Company Next at Bar.

The Tobacco Case (*United States v. American Tobacco Company*, 221 U. S. 106), in effect constitutes Chapter Second in the history of the climax of the demolition of the structures erected by predatory "trusts," which, up to that time, threatened to absorb the major portion of the profits flowing from the commerce and manufacture of the nation. In the prevailing Tobacco opinion Chief Justice White again speaks for the court; and he reaffirms the soundness of the doctrine that a court of equity when construing a punitive and reformatory statute should provide such measure of punishment or relief as the established facts

of the situation demand when inspected "in the light of reason;" whereas Mr. Justice Harlan, while concurring in the result, again expresses his objection to any construction which does not apply the words of the statute in their literal significance. In brief, each of those leaders upon the bench of the Supreme Court reaffirms the argument presented *in extenso* in his opinion appearing in the Standard Oil appeal (page 68).

Important Questions and Vast Interests Involved.

The Tobacco suit was begun in 1907; therefore, it was conducted contemporaneously with the Standard Oil prosecution. The defendants comprised twenty-nine individual defendants and sixty-five American companies (for the most part created under the New Jersey laws), besides two English concerns. Upon the hearing it was conceded the parent company had taken over and absorbed between February 1891, and October, 1898, fifteen domestic tobacco concerns actively engaged in business in the States of Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina and Virginia.

In most instances, the terms of purchase included the right to employ the name of the selling concern; and former principals were usually engaged as managers to operate the plant and to conduct the business as theretofore, with a covenant against otherwise engaging in the production or sale of tobacco for a long term of years. In its warfare to obtain control of the plug tobacco interests, it sold that particular product at a price below cost; but its great resources enabled it to carry on an active campaign at a loss of \$4,000,000; and in the end it compelled the surrender of five large and successful competing companies, including the P. Lorillard Company—its chief rival in the plug tobacco line. A subsidiary with one hundred millions of capital stock was one of the weapons it employed in the "Tobacco War."

Evidence Discloses Characteristic Trust Methods.

In 1899 and thereafter until the commencement of the Sherman suit in 1907, the Tobacco Trust invested fifty million dollars in thirty competing concerns (which it closed down); and

it also acquired plants and interests in Cuba and Porto Rico. The companies it operated were frequently conducted under a secret agreement to conceal ownership by the "trust." The snuff business was monopolized; also the business of manufacturing tin foil—a necessary factor in preparing the finished product. The war was carried into British territory, resulting in an inter-corporate treaty by which the English market was supplied with leaf tobacco through the American company, with the proviso that it would not otherwise operate on English soil (see Exhibits 19 and 20).

Supreme Court Dissolves Tobacco Combination.

To meet and overcome the condition thus disclosed called for more comprehensive application of the principles of the Sherman Law than was required by any previous anti-trust case; but the Federal courts were not daunted by this formidable task. After scrutinizing the facts of the pending appeal, and after a historical review of the acts of the tobacco combinations from its very inception, the judicial determination of our highest tribunal was that (a) use of commercial force to compel sales; (b) secret operation under the names of prior owners; (c) buying valuable factories only to dismantle them, and (d) a policy of reaching out into related fields to obtain control of the sources of supply of necessary articles in order to forestall and prevent competition—were features which taken in conjunction, plainly branded the combination as a restraint of interstate commerce; and that as such it was subject to the penalties imposed under the provisions of the Sherman Anti-trust Act. By order of the Supreme Court, the case was returned to the Circuit Court of Appeals, 2nd Circuit (sitting in New York City), with directions to formulate a decree which would dissolve the combination and prevent a recurrence of the evils charged in the government's bill of complaint.

Result of Oil and Tobacco Decisions.

With this mention of the result upon this appeal (affirming as it did, the regulating power exercised in this case by the

trial court), our narrative of the rise and decline of the empire which predatory trusts had established (or nearly established), upon American soil, draws to a close. It is clearly impossible to overcome the inertia of a disinclination to engage in competition, since human nature is beyond the sway of courts; but by dispersing traffic-restraining combinations, the anti-trust prosecutions—in so far as the natural and inherent limitations of court proceedings permit—did compel the resumption of competitive conditions in trade. The Standard Oil and American Tobacco appeals stand forth very prominently in the records of anti-trust litigation; they resemble twin mountain peaks which dominate the horizon. In a remarkable degree, ability, learning and force enter into the opinions of the Justices concerned in those decisions. Every student of the jurisprudence of that period should give careful and thoughtful attention to those historic cases.

RECENT SUPREME COURT ANTI-TRUST DECISIONS.

It is one of the benefits of a supervisory and preventive governmental agency, viz., The Federal Trade Commission, that it serves to obviate occasions for anti-trust suits. Its authority to take cognizance of monopolistic situations at their start and to prevent and overcome "unfair methods of competition in commerce," make it a bulwark against restraints of trade; and the public has the advantage of an active and experienced body qualified to institute investigations either upon informal request or formal charges, with power to issue restraining orders where the good of the business community so requires.

The likelihood there will be successors to the long line of anti-trust cases is thus reduced to a minimum; although something may be said in favor of the proposition that changes in mental attitude if not in principle have made our manufacturers, traders and financiers increasingly reluctant to incur the uncertainty, odium, and expense of deliberately pursuing a course that involves infraction of the Sherman Law or of the related anti-trust laws.

This comment relates to that predatory class which exists in every department of life, at home and abroad; but, fortunately, the great mass of American men of affairs are disposed to deal squarely; and for them the statutes, Federal and State, serve merely to define the "rules of the game," and to give those rules an authoritative form.

Whether this alteration for the better is due to an improvement in business manners, or of business morals, the occurrence of this change unquestionably has taken place; and numerous observers have noted the fact. All of which goes to show that "the old order changeth, ever giving place to new," an alteration which should cause us intense satisfaction, since it is a change in the direction of benefit to the Commonwealth.

Continuance of Anti-trust Laws Required in Public Interest.

But while the new order affords a reasonable assurance of much benefit, the public interest will not permit of absolute confidence that old-time methods and old-time remedies should be or are capable of being discarded at once; and a pacific attitude assumed by business interests (including the public) might lead to a recurrence of the trust conditions of the '80s and early '90s. However remote may be the chance of reversion to the former type in business transactions in necessities of life, *some* measure of risk exists; and as an insurance against a backward movement, the anti-trust laws must be safely stored in the arsenal of Federal weapons provided for overcoming future trade-restraints. Armed neutrality seems the best condition to which modern society can attain; and "eternal vigilance" is the price we must pay for our freedom in commerce, as well as in our efforts to maintain the political liberties handed down to us by the Fathers of the Constitution.

As reminders—to some extent helpful and healthful—of earlier conditions in interstate trade, certain prosecutions of the anti-trust description have been in process of adjudication; and after a prolonged delay due to the intervention of paramount war-time problems, those cases recently have been passed upon by the United States Supreme Court. We refer to the United

States Steel Corporation, and Reading Railway (Anthracite Coal) cases; as to the International Harvester and Meat Packers cases, those particular litigations were determined by agreement with the Department of Justice, and the terms of settlement do not particularly concern us here, excepting to note in passing that the decrees thus entered, in each instance, admit the necessity of reformation of the defendant's policy and methods.

Prosecution of Steel Corporation.

Since the Supreme Court cases actually decided (*United States Steel* and *Anthracite Coal*) occupy a strategic position as the *liaison* between the old order and the new; and since it is not improbable they constitute the closing chapter of the state trials known as the Anti-trust Cases, let us inquire into the facts in each instance, mainly in so far as the decisions disclose them; and let us also apply thereto the rules of trade-intercourse already judicially laid down and established for our guidance in like situations, as and when they arise.

The United Steel Corporation is easily the premier of all private commercial organizations in point of size; and its history is replete with interest, outside of the legal aspects of its career.

The corporation was organized in 1901, to adjust certain differences and ward off open trade warfare between the Carnegie and Morgan interests—each a potent factor in the domestic steel industry. Some idea of the extent of its dealing may be gleaned from the fact that in 1913 (twelve years after the Company was instituted) the total assets were in excess of \$1,800,000,000; its outstanding capital stock was \$868,500,000; and its surplus was \$151,900,000. The ordinary cash balance approximated \$152,000,000. During the period from 1901 to 1911, the combination controlled 90% of our export trade in steel and steel products—a traffic reaching well up toward two million tons, by the close of the last mentioned year.

Defendant Prevails in Divided Court.

Three Justices of the Supreme Court held in effect that an aggregation so stupendous was an overpowering feature and

dominated the markets for steel both at home and abroad; and that the public should be protected by dissolution of such a potential trust. "*Not guilty*" was the verdict of the majority of the court.¹ The evidences of evil intent and moral turpitude they held to be wholly wanting; and applying those principles customary in criminal trials (as was eminently proper in view of the drastic provisions of the Sherman Law), the majority ruling was that in the absence of a prevailing disposition to intimidate its rivals and overreach the public—mere size was not an incriminating factor and would not overcome evidence of a useful purpose directed to upbuilding American commerce by superior resources and efficiency.

It is not too much to say this exoneration of the Steel Corporation appears to be regarded very favorably by the business public of the United States; although the narrow margin of a decision by four to three Justices emphasizes the fact that there is potency and vitality in the Anti-trust Laws; and that wanderings from "the straight and narrow path" of correct corporate conduct as therein laid down and demarcated, will not be tolerated in future situations where evidence of a monopolistic intent is shown.

Foreign Trade a Factor in Court's Ruling.

The growth in volume and importance of our overseas trade is plainly indicated in the closing paragraph of Mr. Justice McKenna's opinion, delivered in behalf of the majority of the court, March 1, 1920, whereby it appears one of the controlling influences which led that tribunal to refrain from a decree of dissolution consisted in the "material disturbance of; and, it may be serious detriment to, the foreign trade" of America which the disruption of the organization of the Steel Corporation would inevitably entail.

Later in point of time (April 26, 1920) and of equal importance in the sphere of anti-trust prosecutions, comes the

¹Two judges took no part in the consideration or decision of the case.

decision dealing with the Anthracite Coal Combination. Historically and geographically, the property and property-rights involved in this case are deserving of more than passing notice.

The hard-coal deposits of the United States are localized to a remarkable degree. Some four hundred and eighty-four square miles of workable beds are contained in five adjoining counties of Northeastern Pennsylvania; and these yield 96% of the total output of the country, averaging annually 75,000,000 tons. The distance to tide-water is only two hundred miles; and six railroads extend into portions of those fields. Canal transportation at an early period afforded water competition, but this means of transit has fallen into disuse.

Under a mistaken policy, the State of Pennsylvania not only tolerated but afforded actual encouragement to purchases of these coal lands on the part of railways, with the result that in 1874 most of these lands were in process of being taken over by railway interests. In that year, the state constitution was amended to prohibit the combination of mining and transportation utilities; but the change came too late to prevent the virtual monopolizing of coal lands.

Policy Violated Economic Principle.

This mistake was not alone an error of judgment in permitting a necessity of life to fall into hands that were not inclined to promote the public welfare through active competition; the fault goes deeper and enters into the region of false economics and superficial statecraft. For it is very plain that private ownership of mineral resources extending far beyond present needs inevitably requires that the ultimate user shall pay a price that will compensate for the interest charges during the intervening years; whereas public conservation holds the property intact until there is present need for exploitation of the property. Computation discloses that even at a nominal purchase price, the product must be held at a high cost to the consumer, when actual mining occurs at the close of a fifty-year period, if interest charges are added to the initial cost.

Be that as it may, the six coal roads between 1873 and 1898

entered into various pools or combinations to govern the production and price of anthracite coal, and also to compel the independent miners to maintain the standard price, viz., the price fixed by the railways. When pooling was made illegal, the device of leasing competing systems was inaugurated, with the result that, by the year 1892, the Reading Company controlled 70% of all anthracite shipments.

When this course became burdensome and inconvenient for the railways concerned, an era of consolidation began as instanced by the purchase, in 1898, of the New York, Susquehanna and Western Railroad in the interest of the Erie Railroad; and about that time (1901) the Reading Company absorbed the Central Railroad of New Jersey. The independent operators took alarm at the impending destruction of all competition in transit rates to tidewater, and began construction of a seventh railway to meet their needs.

Such an enterprise was naturally regarded unfavorably by the six existing systems; and they made common cause to prevent intrusion upon their virtual monopoly. To effectuate their purpose, the broad charter powers of the Temple Iron Company, organized in 1873, were utilized; and the presidents of the combining railroads were given seats upon its directorate. Through this channel, a community of interests was established in the coal trade; and by perpetual leases extorted from the independent operators, competition was eliminated, and the project of a seventh coal-carrying road was likewise given a death-blow. This unified control reduced the tonnage in private hands to less than 4% by the year 1907.

In 1902 the Federal Government, through the Interstate Commerce Commission began taking testimony concerning conditions in the anthracite coal trade; and a mass of useful information had been accumulated in 1906, when the Congress enacted the commodities clause (Hepburn Act), making it unlawful for railways engaged in interstate traffic to transport over their lines coal mined or owned by coal companies with which they were associated by stock ownership. The Sherman Anti-trust Act of July 2, 1890, illegalized combinations in restraint of

trade and attempts to monopolize trade and commerce, and in 1913 under each of these statutes suit was brought against the companies and individuals concerned in the anthracite coal combination.

Grounds on Which Dissolution Decree was Based.

In the opinion of the United States Supreme Court delivered by Mr. Justice Clarke, the legal fiction of joint holdings per holding companies is brushed aside; and it is held that "the abdication of all independent corporate action" destroys the right of the companies to be considered separate entities, since they are subject to actual dictation and control by identical paramount interests. Such emasculated corporate organizations are denominated (as is every way proper) mere instruments of those paramount interests; and it is held the laws of agency apply to their acts, making the paramount interests liable therefor, in law as in fact.

In brief, the relations existing between the several coal-carrying railways and their affiliated mining companies, and the restrictive claims in mining leases with respect to the exclusive shipments of coal over favored roads are each declared illegal; and such practices are ordered to be terminated in the interest of the public and in conformity with the provisions of the Sherman and Hepburn Acts.¹

This decree of our highest tribunal is not only of importance *per se* by reason of the vast interests at stake in a commodity which is a necessity of life in northern climes; it constitutes as well a complete answer to those persons who intentionally or otherwise are disposed to disparage and belittle the vitality and efficacy of the anti-trust laws. Like the rock of Gibraltar, the Sherman Law stands erect, and dominates the situation; and its continuation is necessary as a place of refuge—a virtual titillation are overcome by forces that perennially are seeking to obstruct or monopolize the fields and highways of American commerce and trade.

¹See *U. S. v. Lehigh Valley Ry. Co.*, Dec. 6, 1920, and *Duplex Printing Co. v. Deering*, Jan. 3, 1921—where the Sherman Anti-trust Law is construed and enforced. The latter case also construes portions of the Clayton Act.

LIMITATIONS INHERENT IN ANTI-TRUST PROCEEDINGS.

Cycles occur in matters economic and legal, as well as in those concerning developments in geology and astronomy; and so it seems to us that the close of the third decade since the enactment of the Sherman Law marks the ending of a distinct era in the anti-trust department of American jurisprudence, and calls for some comment upon the extent and nature of the progress achieved during this period covering the third of a century—the average duration of human life.

The twenty-five year period extending from 1890, the year when the Sherman measure became law, down to 1915, marks the vital era of active anti-monopoly prosecution, since (for reasons which will appear later), the Federal Trade Commission has to a large extent preempted the ground heretofore occupied by the Department of Justice; and the public interests since 1915 are protected and conserved by that semi-judicial body rather than through the terror of the law as applied in drastic anti-trust prosecutions, that savor more of criminal than civil procedure. The subject is interesting *per se*; and should not be wanting in value as a basis for taking stock and estimating those things accomplished and reforms still demanded in the cause of better government in general, and more particularly in behalf of greater freedom in trade along the highways of interstate traffic.

Summary of Results Attained.

During this quarter of a century of Sherman Law enforcement—1890 to 1915—eighty-four indictments were returned under the criminal features of the statute; and six convictions were secured. In a number of civil actions, defendants were prosecuted for violating the court's injunctions; and sentences of fine or imprisonment were imposed.

Eighty-seven civil suits sounding in equity were filed under the anti-trust statute, in the corresponding period, and prayers for dissolution were incorporated in the petitions of the most important cases. Judgments in favor of the Government were

entered in twenty-nine cases; in thirteen instances decisions of an adverse nature were rendered, or decrees of dismissals were entered; in fifteen cases agreements were reached and the prosecutions were terminated by the entry of consent decrees; while at the close of the twenty-five years period, i. e. in 1915, thirty proceedings were still pending. Only one suit was brought to enforce the condemnation of property seized in transit, as permitted under the statute; and this proceeding was dismissed with the consent of the Government.

Numerous private actions for damages were brought in the years 1890-1915; but the provision permitting recovery of treble damages proved to be illusory and very inadequate, when actually invoked by injured persons. The recoveries in the *Danbury Hatters'* case (235 U. S. 522) and the action by the City of Atlanta against the Addystone Pipe and Steel Combination (203 U. S. 390) are perhaps best known among cases where actual recoveries were obtained.

In nine suits brought by non-government parties, injunctions to prevent alleged threatened injuries were refused; not even the State of Minnesota was able to obtain such relief in equity through the Sherman Law channel. In every instance the court held, under a somewhat strained or very literal construction, that the statutory right to apply for injunctive relief pertained solely to the Federal Government, operating through the Department of Justice.

Judicial Supervision Lacks Administrative Element.

Summarizing these results, it will be readily observed that the positive results are far from satisfactory. It is true a number of powerful combinations were dissolved and their separate units compelled to operate as individual entities; but the former interests almost universally continue in control, and in numerous instances there is ground for belief that the "overhead" charge for administration is increased by such duplication of official staffs, and that some measure of economic waste has resulted from the enforcement of the separatistic policy inherent in the

Sherman Act. Where principles are involved, minor considerations must yield precedence; and the public benefit is the paramount question. As in geometry, the whole is greater than any part, however large; and the interest of the Commonwealth exceeds that of any individual interest.

Still, enquiry naturally arises whether there is no practical method whereby corresponding results can be obtained without raising questions of principle. Is there no alternative route whereby commercial efficiency can be retained, without the sacrifice of competitive conditions in trade?

Situation Demands Permanent Trade Commission.

The answer to this natural query is found in that Federal legislation whereby, in answer to an almost universal demand by legitimate business interests, the Federal Trade Commission was created, with power to investigate incipient monopolies and trade-restraints, and to nip the impending "trust" before it has flowered, much less reached a state of full fruition. Under the old order, many old combinations have been permitted to flourish and new combinations are perennially in the forming. Prosecutions under the Sherman Law are abortive; the consuming public has not greatly profited by the dissolutions of certain "trusts," and the continuance of other combinations of equal scope, but less openly aggressive in their methods and deportment. The lunch box of the working man and the larder of the housewife have not particularly benefited. Business manners rather than the essential element of control of commodities has become the test and touchstone, where the question of an anti-trust prosecution is concerned. To prosecute all would far exceed the capacity of any staff the Department of Justice could assemble, even were its annual appropriation increased many fold.

Fortunately for private and public interests, the era of regulated combination is supplanting the era of enforced competition. Unrestricted competition is ruthless and destructive in its ultimate results; it was this condition which bred the "trust"

which came into being in the seventies and eighties, and flourished so amazingly during the succeeding two decades. The Federal Trade Commission has a two-fold function:

First: It investigates, and to that extent diagnoses the economic effect of combinations now existing or hereafter formed.

Second: It scrutinizes charges of "unfair methods of competition in commerce;" and since the enactment of the Webb-Pomerene Law, its authority and jurisdiction extends to American overseas trade.

Thus it will be seen that while presumably sharing in the imperfections inherent in human institutions, the Federal Trade Commission Act promises relief to American trade along normal and modern lines, as developed by the actual experience garnered during those thirty years since Senator Sherman contributed to our series of anti-trust laws the statute which bears his distinguished name.

CHAPTER V.

The Clayton Law and The Federal Trade Commission Act

Description of the Purpose and Plan of Those Statutes, With Special Attention to the Change of Attitude Regarding Efficacy of Policy Embodied in Anti-trust Laws; Also, Some Mention of the Adoption of the Principle of Regulated Competition in Place of Enforced Competition in Trade.

We think our study of the leading anti-trust cases in the preceding chapter has resulted in disclosing a clearly-drawn distinction between:

(A) Restraints in trade which are *malum per se*.

(B) Restraints of competition which by law are made subject to a certain measure of discretionary scrutiny by the courts, but where guilt must be shown in each particular case through an inspection of the facts in the "light of reason."

This distinction seems to us to be plainly inherent in the opinions of Mr. Chief Justice White in the Standard Oil and Tobacco cases.

The trust question in all probability having been set at rest by those leading decisions of the United States Supreme Court we discussed in Chapter IV, it became possible for something further to be enunciated in the way of a formulative doctrine—something positive, concrete and constructive, beginning where the anti-trust cases left off, though based upon the results and benefits derived therefrom. The static condition of the entire system of anti-trust laws made it possible to assume the danger phase of the assault upon the right to compete had passed, and that a new Era of Regulation could now be inaugurated and made effective. It remained for President Wilson to originate such a plan. Furthermore the "Light of Reason" doctrine made

it possible to differentiate between degrees in conduct in situations where basic conditions did not constitute a "bad" combination of the "trust" or monopoly sort. This general situation having resulted, it became feasible to classify and regulate business practices and transactions, and to institute a division of government with semi-judicial powers, operating exclusively in the preventive field, thus nipping the budding trust, and obviating spectacular anti-trust suits prenataally, as it were. This idea of a trade-regulating tribunal—half judicial and half administrative—at length took on a concrete form through the creation of the Federal Trade Commission.

New Factors Require New Alignment.

The fact is that there was proceeding a readjustment of our national affairs in several directions, all more or less related. The advent of the income tax was bound to distribute the tax-burden more evenly and equitably than ever before; and this in its turn rendered the Federal Government far less dependent upon tariffs and excises for its financial needs. As a foreign instance directly in point, the Canadian income tax budget of 1919 has been increased to permit a lower tariff upon agricultural commodities. It seems apparent the road was cleared for more extended commerce with other countries by doing away with tariffs for revenue, and continuing them only where a new industry or other special reason called for a measure of protection by way of an import duty. Where a country enters foreign trade it must compete against all comers; and the workmen must be able to obtain necessary supplies at reasonable rates that will enable them to work for wages that in turn will enable manufacturers to attract trade and do a successful business in the competitive markets of the world. Furthermore, if we expect to sell our goods abroad, we must also buy and be prepared to accept the goods of foreign customers when tendered in liquidation of the account; otherwise, as every one will readily see, there exists an impediment which places us at a disadvantage with manufacturing nations which do permit a free flow

of commodities. This is not intended as an argument in favor of "free trade," so-called; but we think it is apparent that, in general, cheap supplies at home and a minimum of tariff charges are necessary to build up and maintain foreign trade—although unquestionably there are cases where manufacturing efficiency or exceptional resources, or both qualities combined, afford the United States an advantage too great for competing nations to overcome. In brief, no nation is under obligation to enter the race for foreign trade; but when it definitely decides to appear in the lists as a contestant it must conform to the elementary "rules of the game," or that nation is foredoomed to experience defeat.

Be that as it may—one thing is certain: Prosperity in its fullest measure, whether in domestic or foreign trade, must not be looked for while American merchants and manufacturers conduct their business under the shadow of threatened or impending Sherman Anti-trust Law prosecutions. Until modified or removed, this deterring influence will operate against every enterprise, where combinations, however innocent, occur. Something affirmative or at least advisory must be introduced in the place and instead of Sherman Law "Thou Shalt Nots." If mercantile peace and 100 per cent efficiency is sought, a code of commercial relations is called for; and this can be introduced only through the medium of some continuing body with administrative powers—half legislative, half advisory in its functions—that can at once lay down and enforce rules of fair dealing among competitors. To sum up the situation—the Sherman Law tells us what *we must not do*; but is silent as to what *can lawfully be done*. And merchants and manufacturers feel the need of a sign-post that will direct them to the authorized pathway which they may tread without fear of Sherman Law prosecutions.

In answer to this almost universal sentiment, President Wilson proposed legislation tending to cause corporations, partnerships and individuals to adopt and maintain fair methods in competitive trade; and this suggestion, when worked out and enacted, took on the form of the Clayton Law and the Federal Trade Commission Act.

THE CLAYTON ACT.

Taking up these statutes in the order named—it must be admitted the Clayton Act, or Supplemental Anti-trust Law (as it is variously termed), is of a different nature from the measure President Wilson had in mind. When he delivered his message before Congress January 20, 1914, dealing with monopolies and trusts and urged legislation to create a trade-regulating commission, and in his address asserted: "The opinion of the country would instantly approve such a commission," the whole tenor of his message shows he intended and expected the commission would have advisory and commendatory powers, in addition to its administrative and judicial functions; and that the public would welcome a commission equipped with every one of those prerogatives. The Committee on Interstate Commerce, in its report upon the proposed Trade Relations Bill (one of the five measures that were comprised in the final draft of the Clayton Law and the Federal Trade Commission Act), thus expressed that committee's views on this important topic: "There ought to be a way in which men in such an (untried) venture could submit their plan to the government and inquiry made as to the legality of such a transaction; and, if the government was of the opinion that competitive conditions would not be substantially impaired, there should be an approval; and in so far as the lawfulness of the exact thing is concerned there should be a decision, and if favorable to the proposal there should be an end to that particular controversy for all time."

Congress Denies Right to Approve.

Congress, however, would not listen patiently to arguments that advocate conferring upon any board or commission whatever the power to commend. Congress was wedded to the enactment of prohibitory statutes; in its opinion no body of men should be entrusted with the right of stamping the government's approval upon the acts or methods of other men. Such a usage was (from the legislative viewpoint) too nearly allied to con-

ferring titles of nobility to be practicable in a republic. Both measures—the Clayton Law and Trade Commission Act—accordingly were drafted along the old familiar lines of prohibitions; and there were annexed thereto only those powers necessary for the enforcement of the commission's regulations and mandates in this restricted field. Adventures into the field of commendatory recognition of merit were therefore left for some future Congress—if such a Congress shall ever occur. In monarchical England, or in highly centralized France, such legislation might occasion neither surprise nor adverse comment; but to the legislative mind commendation would be at the least ineffectual in the atmosphere of American affairs. In short, Congress decreed that a feature savoring of paternalism must not be grafted upon democratic institutions. So much for this effort to combine old bottles and new wine!

Price Discrimination Prohibited.

The first prohibition (Section 2) of the Clayton Law (See Appendix, page 420) is directed against price discriminations, and deals with a favorite and highly effective anti-competition method and expedient adopted by all or nearly all of the trusts. In its further provisions Section 2 is likewise intended to prevent practices shown to have been in every day use by the Standard Oil and American Tobacco companies up to the date of their dissolution by the decree of the United States Supreme Court. Examining the list of trust methods thereby rendered unlawful (see pages 67, 70), we discover it includes the organization of "fake" independent concerns which cut prices in one community while the parent corporation recouped its loss by raising prices in non-competitive territory; also, penalizing retailers who display competitor's goods in the window or on the counter—both familiar illustrations of trade-unfairness; while the extreme of such conduct may be said to consist in tampering with a rival's goods and thereby convincing dealers that the trust-made product is superior.

The initial feature of the Clayton Law prohibitions is clearly

anti-trust, because it nips the bud from which a future monopoly or trust might spring. In America such combinations grow from enterprises and schemes on the part of clever but unscrupulous men—governmental grants of exclusive rights not being tolerated in commerce conducted under a republican form of government. It follows that President Wilson was right when he inaugurated a campaign which would do away with "price discrimination," and would create an atmosphere in which new trusts could not flourish and old trusts would wither away and disappear.

The new process of trust-combat is the contrary of spectacular. It involves no state trials of the familiar anti-trust sort, with an expense of \$200,000 in way of witness fees, and with special retainers for eminent counsel, to be met out of the public exchequer; and in addition involving an appeal to the United States Supreme Court. The new process of trade regulation is quiet and unobtrusive; but to trust-interests it is deadly. Where predatory trusts require curbing and their centralizing influence must be crushed, it is the pressure of the glacier and not the rush of the avalanche which most surely produces the power requisite to accomplish that useful end.

Attention must be called to the fact that for the terms "discrimination in price" and "unfair methods of competition," there will be found absolutely no definition in either the Clayton Law or the Federal Trade Commission Act. This omission, however, is due to no oversight; it expresses the settled policy of the framers of those laws. It leaves the meaning elastic; and when there arise new forms of discrimination or of unfairness in trade, courts are unhampered by statutory phraseology limiting the extent of the deterring prohibitions; on the contrary, courts remain free to adopt a construction to fit the exigencies of each particular case which comes before them. This has long been the attitude of courts and legislatures with respect to the term "fraud;" and when framing these twin statutes, Congress adopted a like policy respecting the terms "discrimination in price" and "unfair methods of competition in commerce;" in short, they are formidable in proportion as they remain indefinite in their meaning and scope.

Tying Contract Illegalized.

The second prohibition (Section 3) relates to conditional or "tying" contracts.

The practice therein condemned consists for the most part in requiring customers to agree to purchase supplies from the concern which by patents or other means has gained control of the basic process or machine. Thus, shoe manufacturers who of necessity employ patented machines are "tied" to one brand of eyelets, or to thread of a particular make. The principal producer of mimeographing machines was specially given to this method of creating and maintaining a monopoly in its line of trade; for its mimeographing machine was furnished to customers only upon a lease; and failure to employ its brand of paper and ink automatically terminated the leasing agreement and ended the right to use the machines. It will readily be seen that this policy deliberately and unduly extended the scope of relationship growing out of the lease of the machine; it gave to the maker or patentee an exclusive right equivalent to letters patent covering every description of article entering into the process.

As was natural, proprietors shielded themselves behind the excuse that their wares were especially adapted to their machines; and that the product was of higher grade and of more uniform quality than could be obtained by employing the goods of independent dealers. Doubtless this claim was true in some instances; but the practice annihilated competition and there was no redress for the customer where fictitious values were placed upon articles thus controlled.

The manufacturing public was much exercised over this novel and highly effective form of mercantile legerdemain; and fair-minded men deeply resented these acts of oppression. The ingenious scheme appeared to be beyond the reach of the courts; but Congress cut the Gordian knot by illegalizing the transaction "where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Since the two prohibitions contained in Sections 2 and 3 of the Clayton Law, i. e., those directed against price discriminations and "tying" contracts, constitute the measures of relief which most closely concern individual citizens—it may be well at this juncture to call attention to the provisions of Section 4 of the Clayton Law, which, by widening the scope of Section 7 of that Anti-trust Gibraltar, the Sherman Law, permits recovery of threefold damages by "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws." By this upward revision, threefold redress is extended to all persons sustaining damage by acts in violation of the Clayton Law. This statute, as we have seen, is denominated in its title "The Supplemental Anti-trust Law;" and accordingly, that fact brings infractions of the Clayton Law squarely within confines of the term "anything forbidden by the anti-trust laws."

Restraints by Stock Ownership Forbidden.

The third prohibition under the Clayton Law consists in the interdiction of ownership by one corporation of the capital stock of another, where the effect may be to restrain commerce or may tend to create a monopoly.

If we are warranted in assuming that President Wilson was the author or prime mover in the selection of vulnerable points where the "trust" octopus could be attacked with reasonable hopes of accomplishing its overthrow, we are obliged to admit that he has exercised great skill in his choice of spots where the legislative javelin can penetrate with deadly effect. By prohibiting and penalizing price discrimination and the entanglements of "tying" contracts, two favorite trust methods have been practically eliminated; and the third prohibition removes the main dependence of trust-promoters when seeking to combine an entire industry under one central control. The result appears to us to savor of the student's lamp rather than of the legislative conference. The essential idea is different from the prevailing note of the other anti-trust laws. The Clayton Law seeks to dry up

incipient monopolies and "trusts" by cutting off their branches and severing their roots and girdling them, rather than, through strenuous ax-blows of Sherman Law prosecutions, seeking to hew apart their mighty, full-grown trunks. If we change the metaphor and adopt the language of the medical art—the Clayton Law physician has first carefully diagnosed the case, and has then applied remedial measures, meanwhile exercising due care the disease does not spread itself abroad through the community.

We believe it has been abundantly shown (page 39) how, in America, monopolies have passed through a process of evolution comprising three stages: *First*, the community of interest, involving use of the "pool" or "gentlemen's agreement," as the uniting bond; *Second*, the "trust," where friendly interests desiring to co-operate, transfer the legal title and voting power of their individual holdings to joint trustees, and they in turn manage the property and elect themselves incumbents of the important executive offices; and, *Third*, the holding company, which in its essential qualities is a perpetual corporate custodian, substituted for individual trustees. It is this fruition of earlier stages, viz., the holding company rather than the "common interest" and "trust" devices, which the third prohibition of the Clayton Law seeks to lop off.

To accomplish that forward step in the development of the supplemental anti-trust campaign, Section 7 provides: "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce," where the effect of such purchase may be to substantially lessen competition between the two corporations, or shall restrain commerce or tend to create a monopoly in any line of commerce. Furthermore, corporations are forbidden to acquire, directly or indirectly, the ownership of all or any part of the shares in two or more corporations engaged in commerce where such stock ownership or employment of the voting power may operate to substantially lessen competition between the companies thus purchased, or to restrain commerce, or which develops monopolistic tendencies.

Prohibitory Clause Analyzed.

The first clause of this prohibition is obviously enough directed against the act of one competitor in buying out another, and by practical merger eliminating competition or creating a substantial monopoly in their common line of trade; whereas the second clause strikes directly at the holding company as a factor in the trust-originated process of drying up competition in the field of American trade. It should be noted that the statute is forward-looking. It does not undertake to invalidate monopolies or trade-restraints already existing and in operation. As to those, the Supplemental Anti-trust Law is silent. It was apparently so designed as to leave all going anti-competition concerns to the rigors of the Sherman Anti-trust Law.

In practical application the prohibition would prove too all embracing if no exemptions were provided; therefore, ownership of stock for investment only is excepted; and the statute also provides for other exceptional situations.

However, discussion of exceptional cases must not be permitted to divert us from proceeding with our theme in its natural order; and thus advancing, we discover awaiting our attention the final provision among the prohibitions of the Clayton Law. This provision is a measure calculated to safeguard competition in business, and as such demands careful consideration. We refer to

The Interdiction of Interlocking Directorates

Even to the trained observer, monopolistic tendencies emanating from Boards of Directors are less apparent than those which flow from the three trade-restraining elements we have already described; but a moment's reflection will disclose to us that President Wilson or his advisors—or both working together—attacked the very keystone in the arch of trade-control when they inserted this inhibition of "interlocking" boards. It is the final and perhaps most effectual among the group of prohibitions embodied in the Clayton Law.

A chart showing the chain of allies and connections of, for example, the "Morgan group" of bankers as then constituted would include the principal corporations engaged in banking and transportation; also practically the entire class of manufacturing concerns which brokers for convenience style "industrials." Hardly a vital interest of the nation could not be influenced and, in numerous instances, controlled through the convenient channel of representation upon the board of directors; and there are a number of financial "circles" which in their power and scope rival the Morgan group. This means of tying together supposedly independent or competing interests is known as the "interlocking directorate;" and the term is thus employed in the Clayton statute.

To meet the situation and overcome the trade-restraining influences of such a situation as we have described, the Clayton Law (Sections 8 and 10), prescribes:

First: Directors, officers or employees of a bank with more than \$5,000,000 resources are prohibited from "interlocking" with any other banking institution whatever.

Second: No interlocking is permitted between banks where both are situated within cities of more than 200,000 inhabitants.

Third: "Interlocking" between all commercial competing concerns of more than \$1,000,000 resources is made unlawful.

Fourth: Common carriers are prohibited from "interlocking" with construction, supply or financial concerns; and this exclusion is extended to and disqualifies candidates who are managers, purchasing or selling agents, and any person having a substantial interest in similar concerns which have dealings with common carriers.

Congress subsequently deferred the effective date of Section 10 until January 1, 1919. Managers of railroads are much aroused over the publicity open bidding requires; but this does not necessarily militate against the value of the reform.

How Prohibition is Enforced.

The enforcement of Section 10 is entrusted to the Federal Trade and Interstate Commerce Commissions within their sev-

eral provinces; but in these as in all trade-restraining situations, the Clayton Act, unlike the Sherman Law, affords to individuals the right to apply to the Federal courts for injunctive relief. Infractions of the Clayton Law are subject to fines and penalties. Violations of the penal provisions of the anti-trust laws are denominated crimes on the part of every officer authorizing, ordering or doing any of these unlawful things; and examination of this list will disclose "a fine not exceeding \$5,000 or imprisonment for not exceeding one year, or by both, in the discretion of the court." The deterrent effect of this clean-cut method of placing responsibility in executive quarters is apparent; it differs radically from former corporate practices, whereunder payment of fines was passed along to the stockholders by deducting the amount from the ensuing dividend.

Let us now turn to a statute which is a civil as opposed to a criminal measure; we refer to

THE FEDERAL TRADE COMMISSION ACT.

Inspection of the main functions of the Federal Trade Commission (see text of act, Appendix, page 409) discloses the fact that they are fundamentally distinct. In one instance it sits as a Board of Inquiry, institutes and prosecutes investigations, compiles data and reports, either upon its own initiative or at the request of Congress or of the President; whereas in the other capacity it meets to hear testimony and issues orders granting relief—orders which may be enforced by the Federal courts and are subject to appeal.

The combination of powers so dissimilar and so far-reaching, creates a department which is unique in Federal legislation dealing with trade and industry. The general framework is admittedly constructed along lines similar to those of the Interstate Commerce Commission; but the field for the latter body is one connected with supervision of transportation facilities conducted under charters granted by the individual States or the Federal Government—which is a very different matter from regulating transactions of buyers and sellers engaged in everyday trade-

intercourse. The Sherman Law, as we have seen, made successful war upon "trusts" and monopolies, and cleared the road for free competition; but being a restrictive and in no direct sense a constructive statute, it could not proceed further and regulate the traffic that ensued. Something in way of an organization corresponding to a traffic police was demanded in the public interest; and from that demand there sprang in natural sequence the Federal Trade Commission. Looking at the situation broadly and with proper attention to the history of the campaign which (as Chapters III, IV describe) has been carried on against American "trusts" and would-be monopolies during the preceding thirty years, we see clearly that Congress intended the Clayton Law and the Federal Trade Commission Act, operating conjointly, should constitute a code of business ethics, fortified and equipped for enforcement of the rules of conduct embodied therein.

Trade Commission's Duties are Distinctive.

Each of the functions of the Federal Trade Commission must be viewed in connection with the situation it was intended to meet; otherwise the machinery created for those useful purposes cannot be appreciated or understood. If the objects those several provisions were intended to accomplish are distinctly seen and kept constantly in mind, numerous difficulties and uncertainties will disappear; and the task of understanding their distinctive functions will be greatly diminished.

With these preliminary remarks—let us now consider the Federal Trade Commission's powers and duties when sitting as a board of inquiry.

Power to Investigate.

By Section 6 of the Federal Trade Commission Act it has received general power to gather, compile and distribute information. With this object in view, the Commission is given authority in eight particulars:

- (1) To inquire into the organization, business, conduct, prac-

sion, a large percentage would be incapable of supplying information of material interest to the Commission; and these concerns should be relieved from the burden of making reports. Under the provisions of Section 6, b, special reports can be demanded whenever occasion requires.

(8) Investigations in matters connected with the foreign trade of the United States are authorized; and the Commission is empowered to report to Congress thereon, with recommendations. Under this provision of the statute, enquiries of that description have been instituted from time to time (Section 6, h).

The Federal Trade Commission may exclude the public from its hearings and sessions, and may withhold or publish the resultant information in its discretion. Where corporations neglect to file required reports, or fail to impart information duly called for by the Federal Trade Commission, penalties (see Section 10) are imposed by this act.

We shall next consider

THE FEDERAL TRADE COMMISSION AS A JUDICIAL BODY.

In the exercise of this function, the Commission is empowered to hold hearings as to particular acts specified by statute as subject to such inquiry, and to enter orders "to cease and desist" when such relief is in accordance with the facts thus disclosed. (Section 5.)

Nature and Scope of Complaints.

Complaints may be filed only by the Commission; and such filing is confined to situations where the Commission has reason to believe the anti-trust laws or Federal Trade Commission Act have been violated. This statutory interdiction against the instituting of these proceedings by natural persons or corporations does, in effect, simplify the practice. When a charge alleging a violation of those laws appears to the Commission to be without merit, official action will be refused. Probably, in the event of a mistake or of willful refusal to proceed in a proper case

the United States District Court would by mandatory order compel the issuance and filing of a complaint. Such was the decision of the Supreme Court in a corresponding situation, where the Interstate Commerce Commission declined to take cognizance of a charge, when the party aggrieved had made out a *prima facie* meritorious case. (See *Interstate Commerce Commission v. Humboldt Steamship Company*, 224 U. S. 474, 484.)

Complaints under Section 5 of the Federal Trade Commission Act have an element which distinguishes them from complaints under Sections 2, 3, 7 and 8 of the Clayton Law. In the former proceedings the element of "public interest" must be present; whereas, under the Clayton Law, the disputes of private individuals are the matters required to be adjudicated. This important and far-reaching distinction gives to proceedings under Section 5 of the Commission Act something of the nature and scope of state-instituted prosecutions under the provisions of Section 4 of the Sherman Law.

Two Separate Jurisdictions Conferred.

Examining the means provided for enforcement of the statute, we discover Congress has clothed the Federal Trade Commission with two sets of powers:

First: Where the acts complained of are violations of the Clayton Law prohibitions, viz., (a) price discriminations, (b) "tying" contracts, (c) ownership by one company of stock of another with trade-restraining effects, (d) interlocking directorates. In every instance the procedure set forth in Section 11 of the Federal Trade Commission Act calls for the filing of an informal written statement by the person aggrieved; and if the Commission finds upon inspection of the charges and after a hearing, that there is just reason to believe either of these statutes is being violated, a restraining order may be issued.

Second: The Federal Trade Commission in matters of commerce may also (Section 5 of the Act) proceed under the general functions of a "grand jury" and acting upon its own initiative, summon the alleged offender before it. The language of the

statute is couched in broad terms: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks and common carriers subject to the act to regulate commerce, (offenses which by their nature pertain to the several jurisdictions of the Federal Reserve Board and the Interstate Commerce Commission) from using unfair methods of competition in commerce.

"Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."

Usual Trial Procedure Followed.

In both classes of procedure, the practice calls for the presentation of testimony in support of the charges with the usual right to be heard in defense; and, at the conclusion of the trial, the Commission is empowered to issue a restraining order. Enforcement lies with the Federal Circuit Courts of Appeals; and in case of appeals by defendant, those Federal courts are authorized to review the evidence and to reverse or amend the judgment, basing their findings upon the record as it is transmitted to them by the Commission. It will be observed that this is only a limited review, viz., the appellate court does not possess the power to require the taking of further testimony or otherwise change the record in the case. Attendance of witnesses and production of books and papers can be compelled through the machinery of the Federal District Courts (Section 8); and the government's official records may be placed at the Commission's disposal, by direction of the President.

It is the second phase of the Commission's authority which excites our special interest. A board which possesses the power

to file a complaint and to bring before it for trial any person, partnership or corporation which it shall have reason to believe "has been or is using any unfair method of competition in commerce," is in and of itself a powerful institution; but when we consider the fact that the Commission combines the ordinarily distinct functions of accuser, district attorney and trial judge, it will be seen what a unique position this body occupies among Federal institutions.

That it has "made good" is a statement which few persons except the culprits concerned will deny.

Commission Conducts Economic Researches.

An important function of the Federal Trade Commission consists in the economic investigations carried on by its Economic Division.

In Section 6 of the Federal Trade Commission Act (see page 415) broad investigatory powers are vested in the Commission to gather and compile information as to the organization, business, conduct, practices and management of any corporation, except banks and common carriers, engaged in commerce.

The Commission may also require such corporations to file reports. By direction of the President or either House of Congress, or upon application by the Attorney General, it is authorized to investigate and report on alleged violations of the anti-trust acts.

Numerous important general economic inquiries have been conducted by the Commission by direction of the President or Congress or on its own initiative. Extensive cost-finding and expert accounting work has been undertaken in connection with a number of basic industries. The reports issued by the Commission have been of such high merit that they are looked upon in this country and abroad as authoritative source material of permanent value and importance.

Results Justify Creation of Trade Commission.

Debates in Congress during the formative stages of the Clayton Law and Federal Trade Commission Act plainly indicate the

legislative intent and plan to upbuild a code of commercial ethics that will inculcate a spirit of fair dealing and which in its turn will render trust-methods repugnant to our business men; and a reasonable period must be allotted for the accomplishment of this primary object.

Suffice it to say there is a potent force inherent in the original plan which thus far has triumphed over structural defects in these statutes; and gives promise of ultimately overcoming every obstacle to the useful employment of its powers. As we have endeavored to point out, the Sherman Law removed the obstacles that beset the highway of national trade; to the Clayton Law and the Federal Trade Commission Act belong the duty of policing that highway and of rendering its traffic fair and free for all—not excluding the humblest citizen.

CHAPTER VI.

Aspects of Federal Trade Commission Rulings.

Preventive Influence is Paramount Element.

It is quite evident that while the cases adjudicated under the common law and later under the Sherman Law and anti-trust statutes were calculated to create a sphere of jurisprudence that would operate as a guide and deterrent, still there existed a borderland—a veritable no-man's country—where monopolies and trade-restraints might incubate and grow up to formidable size and be fully flowered before the Department of Justice could proceed and institute an anti-trust prosecution. It is exactly at this earlier stage that the Federal Trade Commission comes into play; and the exercise of its functions and powers has unquestionably brought forth great changes and reforms in the business life of the country. As the report of the Commission for the fiscal year ending June 30, 1919, states at page 45: "Previous to the creation of the Commission (September 26, 1914), the courts had ruled upon various forms of unfair practices * * *. But upon the creation of the Commission it was empowered to leave the shores defined, * * * and, taking the knowledge of those decisions with it, to embark upon an uncharted sea, using common sense plus the common law for its compass."

A New Departure in Trade Regulation.

In brief, under the creating act (see page 409), the Commission was given jurisdiction over a new province, viz., over "unfair methods of competition in commerce;" and it became at once the power and the duty of that semi-judicial body to initiate appropriate proceedings whenever it had reason to believe that

proceedings against those practicing such unfair methods were in the public interest. The procedure in these prosecutions has been dealt with elsewhere (Chapter V, page 97), and in the course of a proceeding instituted by the Commission, the Federal courts have held the Act constitutional; and its orders to cease and desist were considered and judicially determined to be binding within the boundaries of the jurisdiction conferred upon the Commission. In the leading case (*Sears, Roebuck & Co. v. The Federal Trade Commission*, decided by the Seventh Circuit of the United States Circuit Court of Appeals, April 29, 1919), the opinion in the case, per Mr. Justice Baker, clearly sets forth the judicial interpretation, stating the right of the commissioners, when dealing with charges brought before them "to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law; and stop all those practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers quite irrespective of whether the specific practices in question have yet been denounced in common law cases." It is obvious that the Court employs the words "common law" as including those statutes usually styled the anti-trust acts; doubtless the Court regards those measures as declaratory of principles long since established under the early English cases; although of recent years, within the United Kingdom, their authority is much impaired, and the English Courts, under a modernistic policy, deem them "more honored in the breach than the observance."

Benefits Conferred.

Thus it is seen the Federal Trade Commission Law and its companion statute, the Clayton Act, offer relief to the injured competitor and the public long before the trouble complained of has reached an acute stage. As the report states (page 45): "The offending party has his warning and opportunity to cease in abundant time to avoid the indictment-day under the Sherman Anti-trust Act that awaits him, if his restraint of trade or tendency shall, finally, culminate in a monopoly." In the *Sears*,

Roebuck Co. case, however, we find much more than an adjudication that the Commission is empowered to go beyond the limits of the common law when defining "unfair competition;" more than the ruling that mere discontinuance of the offending conduct prior to the issuance of a complaint does not divest the commission of power to proceed to a binding determination; we find in this controversy a decision squarely establishing *the constitutionality of the Act*. Since the defeated party made no application to the Supreme Court for a review, it may be assumed that the opinion of the Circuit Court of Appeals was convincing as to power of Congress to create the Commission and to invest it with the various powers in the act contained.¹

Few Appeals from Commission's Rulings.

Unlike the anti-trust prosecutions, the proceedings before the Federal Trade Commission do not appear destined to build up a system of court decisions, for only five appeals resulted from the issuance of 603 formal complaints in the period beginning with the inception of the Commission, September 26, 1914, and extending to June 10, 1920.

This showing is so remarkable that we feel an official statement and explanation of the experience of the Commission should be presented, in order to amplify the mere announcement of the results obtained. Fortunately, Hon. William B. Colver, a member of the commission, has prepared such a statement:

Summary of Proceedings and Rulings.

"Experience has shown that about two out of three of the complaints which are brought to the Commission's attention are not such as to warrant any formal proceedings and those matters are dismissed without annoyance to the respondent, without publicity and without public knowledge.

"In the five years of the existence of the Commission, there have been 1,978 of such applications for complaint made. These cases have passed through or are passing through the procedure which I have outlined, and with the following result:

¹See also decision in U. S. Circuit Court of Appeals, 6th Circuit, National Harness Mfg. Assn. v. Federal Trade Commission, Dec. 7, 1920.

"On preliminary examination and without publicity or embarrassment, 954 of these cases have been dismissed; 570 are still in the process of such preliminary investigation, and in the remaining 454 cases the Commission has instituted formal proceedings, resulting in the issuance of 603 formal complaints—the excess being due to the fact that in some applications there were a number of respondents who were proceeded against individually. Of these 603 adversary proceedings, 294 have been disposed of while 309 are still pending. Of the 294 disposed of, 56 were dismissed, the Government, on full hearing, having failed of preponderating proof or the respondent having made a sufficient showing of defense. Of the remaining 238 cases, the orders of the Commission to cease and desist were issued, and here comes what I believe to be one of the greatest examples of the inherent fairness of the American business man, for out of the 238 cases where the business concern after trial and hearing and after having had brought home to it the consequences, often unsuspected, of its conduct upon competitors, 194 of the respondents have voluntarily agreed to accept the order to cease and desist and to stop the bad practice.

"In the remaining 44 cases, the concerns complained against by other business concerns, resisted to the end and the order to cease and desist was nevertheless issued.

"Thus we find that the Federal Trade Commission, seeking to administer a fair and just law and dealing with fair and just people in a spirit of fairness and equity, finds a minimum of controversy and a maximum of accommodation."

(Extract from address before Wholesale Grocers' Association, delivered June 10, 1920.)

Novel Feature Introduced by Trade Commission.

Perhaps one explanation of the ready acquiescence of business interests, where Federal Trade Commission rulings are concerned, will be found in a novel and highly equitable practice which, in effect, secures submission of the general complaint to a jury of business associates, prior to filing a complaint against an individual infractor.

In a sense, validity or invalidity is established prior to the instituting of the proceeding and only the facts of the particular case require scrutiny before a final determination is reached.

But, to obtain the benefit of the official version of this innovation in things legal, we quote again from Mr. Commissioner Colver's statement:

"TRADE PRACTICE SUBMITTAL

"When a large number of complaints come to the Commission touching a given industry or when a complaint is made alleging an unfairness of some practice which is either an ancient practice or one almost universally employed, the Commission feels that a single case may not present all the facts and that a decision upon the facts involved in an individual case would tend to be harmful rather than helpful, it employs a procedure which it has called Trade Practice Submittal. This procedure has also been employed by the Commission in a number of instances at the request of the industry itself.

"The proceeding is to invite as complete a representative body of men as possible in the industry to meet with the Commission and there discuss frankly and fully any and all practices which the industry and not the Commission, may have questioned as to whether they are fair and good or bad and useless; or whether they are unfair. Open and free discussion is invited and in the end, the Commission makes no decision or ruling nor any expression of opinion, but asks the meeting to say out of the experience and technical knowledge of the members of the industry, what are good things and what are bad things. This decision of the industry itself is taken by the Commission as a guide and thereafter if business concerns complain that practices which have been deemed unfair by the industry itself are being indulged in, the Commission will assume that there is sufficient reason to believe that such practices are bad, and, without a long preliminary examination, bring the contested practice to issue so that it may be tried out in an orderly way according to the formal proceedings which I have heretofore described."

Advantage Accruing from Submittal.

As already mentioned, this procedure secures the practical estimate contained in the consensus of opinion of the trade or calling concerned in the orderly conduct of business in that particular line; and as in the case of a surveyor, the existence of a correct "hindsight" aids materially in projecting a straight line to operate as a guide in laying out the forward course. The Commission, however, is not bound by such a trade practice submittal.

Promoters' Practices Investigated.

Another new departure in the career of the Federal Trade Commission has been its active participation in the campaign to hunt down and exterminate the predatory class of promoters who have thriven and in numerous instances acquired fortunes, through the sale of worthless securities commonly termed "wild cat stocks and bonds." Preying as they do upon the ignorance or inexperience of investors, these persons are as despicable as dangerous; and there is no valid reason why quarter should be shown in "blue-sky cases," wherever transmission from one state to another brings the accused within the province and jurisdiction of the Federal Trade Commission Act.

There was a natural hesitation as to extending the activities of the Commission into a sphere which, upon the surface, appeared more nearly related to finance than to commerce; but previous to the floating of the Victory Liberty Loan,¹ the legal aspect of such proceedings was carefully investigated at the instance of the Secretary of the Treasury, the chairman of the Federal Reserve Board, the Capital Issues Committee, and at the request of many citizens—with the result that a vigorous campaign was instituted and the losses of the public were greatly reduced through prompt prosecution of parties engaged in such fraudulent practices.

In its current report (1919), page 47, the Commission advocates specific legislation, directed to procuring the interdiction of "fake" issues of securities; and suggests that in some manner Congress shall place under control the advertisements and rep-

resentations put forth by persons engaged in marketing new issues of stock. In Great Britain the courts hold promoters strictly liable for the contents of their prospectuses; damages are awarded where the statements are false or misleading. A Federal "blue-sky" law would be productive of results at once preventive and remedial; and the public interest demands legislation to supplement state laws, whether the power of enforcement be vested in the Federal Trade Commission, or in some other body specially created to that end. It has been suggested that stock-promoters' advertisements should contain a conspicuously featured statement of the commissions paid and the net sum accruing to the company; and doubtless this device would be as effective as it is ingenious in enabling the public to compute for itself the actual amount realized for the enterprise; though such legislation should not (excepting in instances of manifest fraud) proceed to the length of appearing to pass upon the merits of the particular investment.

Unfair Trade Practices Admit of Classification.

The Commission's report for 1919 epitomizes the individual prosecutions it has undertaken in the public interest; and the termination thereof, whether by dismissal or issuance of an order to cease and desist, likewise appears in the list incorporated therein. This list appears formidable; but inspection discloses the fact that the grounds for complaints are readily grouped, since perpetrators of offending acts display gregarious tendencies—"birds of a feather flock together."

While it will not be advantageous to consider the cases individually,¹ it is worth while, in closing this chapter to note such of these groups as present outstanding characteristics.

When viewing the complete list of Federal Trade Commission proceedings contained in the report for 1919 (issued June, 1920),

¹See "Federal Trade Commission Decisions" published by the Commission. For a list of practices condemned by the Federal Trade Commission, see Appendix, page 549.

it is apparent the Commission is no respecter of persons; scattered among the names of defendants appear the names of such formidable opponents as National Biscuit Company, Curtis Publishing Company, Shredded Wheat Company, Beech-Nut Packing Company, L. E. Waterman Company, Cluett, Peabody & Co., (Inc.) and the Standard Oil Company in its various regional segments.

Principal Classes Enumerated.

The "unfair methods" therein charged against the various defendants consist very largely in promoting enforcement of price-fixing agreements, whereby the retailer (and sometimes the wholesaler or jobber) is denied a further supply of goods, if the consuming public is permitted to obtain supplies of that particular commodity at a sub-standard charge per unit of retail sale. This objective is striven for by means of systems of rebates and discounts to "the faithful;" whereas, the supply is cut off with ruthless severity, where discipline of dealers is exercised in the interest of the "trust" or price-fixing producer.

Selling goods for a season at less than cost, is a favorite device where a competitor with less financial resources is marked for destruction and elimination; it being the invariable rule, however, that under an enhanced price-list, the public "pays the freight," when the end in view (elimination of competitor), has been accomplished in thorough-going fashion.

Threats of infringement suits, with an occasional campaign of actual litigation against rivals and their customers, are of rather frequent occurrence; and where the result is a series of court proceedings based upon patents or copyrights of no inherent potency and value—the element of "unfair methods of competition" is apparent to all. In such cases the intimidation consists in creating for the refractory customer or jobber, an expense account which is far in excess of the "royalty" or payment of extra profits involved in acquiescing in the unwarranted demand.

Sometimes the "unfair method" takes on the form of violation of Section 2 of the Clayton Act, i. e., refusing to deliver a machine or a supply of a certain commodity, unless or until the other party to the transaction shall enter into a "tying contract," whereby some additional machine or some additional material is purchased at an excessive profit to the producer.

Like "fraud"—its near relation—the term "unfair competition" is a term incapable of exact definition; nor is it desirable that any shackle should be placed upon its meaning. Elasticity is a needful factor, where a term must be left free to include everything which ingenious and designing men can develop in way of taking advantage of the needs of the public, or of the necessities of their associates in trade.

Congress Confers Jurisdiction in Foreign Trade.

The geographic scope of the Trade Commission was enlarged April 10, 1918, by the enactment of the Webb-Pomerene Law; for therein it is provided that the Federal Trade Commission "shall have all the powers, so far as applicable, granted to it by its organic act" to restrain American exporters from engaging in unfair competition toward each other in any foreign country. That the new province thus accorded to the domain of the Trade Commission will develop a distinct line of precedents, should be expected and welcomed. Dealers in foreign countries already are pronouncing favorably upon this supervision of methods in American foreign trade, now its nature and scope are being understood; and the net result should be an enlargement of our overseas traffic built upon the sure foundation of international trade comity and commercial good will. (See Chapter XIV.)

CHAPTER VII.

Analysis of the Results Obtained by the Enforcement of These Preventive Laws.

Liberal Powers Have Obtained Important Results.

While the annual reports of the Federal Trade Commission present an extended list of applications for the exercise of its remedial powers, we believe the cases we have discussed are sufficient in number and importance to afford us pretty accurate information regarding the highly interesting and novel field which that board claims for its own. With this bird's eye view of the situation before us, we think the work of the Commission resolves itself into the following classes:

First: Safeguarding trade by compelling competitors to discontinue practices which are underhand and unfair.

Circulating false or disparaging circulars or information; misleading advertisements; and bidding away employees, are illustrations of the class of acts which have been adjudged to be "unfair."

Second: Protecting manufacturers and merchants from attacks, either direct or indirect, on the part of aggressive, unscrupulous rivals.

Cutting off competitors' supplies and credit, institution of malicious and vexatious suits, and boycotts, are instances of trade-obstructions for the removal of which the Commission has instituted prosecutions in the interest of fair competition.

Third: Obviating Sherman Law prosecutions by preventive measures calculated to destroy incipient monopolies and "trusts."

The attempt to enforce a "tying" contract that would oblige cotton growers to use one particular brand of jute bagging, and efforts of harness manufacturers to place the saddlery business of the nation under one central control, are trade-restraints which have felt the strong, restraining arm of the Federal Trade Commission.

But the Supreme Court (*Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. St. Rep. 572) reversed the Commission because of the insufficiency of the complaint and of the closely associated relationship of ties and bagging. Justices Brandeis and Clarke dissent on both grounds; and their reasoning seems more logical and more in accordance with the legislative intent and the spirit of the times.

The majority ruling appears to ignore the economic and moral problems Congress sought to solve through the media of the Clayton Act and the Federal Trade Commission Law.

Numerous classes of cases demand disciplinary or preventive measures on the part of the trade-protecting body; it oftentimes, on the other hand, transpires that infractions are unintentional or too trivial for serious treatment; and in those instances, a cautionary official message on the part of the Commission is usually sufficient to bring about a speedy reform. Nearly one-half of the 293 applications for relief during the years 1916 and 1917 were settled without the necessity for formal proceedings. This, upon the whole, is a favorable showing, and indicates, as an English historian (Lecky) remarked concerning his own people, that American businessmen are "sound at the core."

Among the Federal Trade Commission's affirmative rulings we find the following:

First: It is permissible under the provisions of the Sherman Law to grant to an agent exclusive rights to sell goods within a specified territory.

Second: The Commission is itself without jurisdiction in a case where defendant's business is carried on within the boundaries of a given state, i. e., is not interstate trade.

Third: A situation which indicates the existence of trade-restraining practices and may demand from the Commission the exercise of its statutory powers will receive official notice and attention even though the person applying for relief is not

directly concerned in the transaction or interested materially in the result.

Resume of Judicial Activities.

In concluding this division of our chapter and as a useful and illuminating summary, we quote from the Commission's report for the year 1917:

"The large number of industrial concerns seeking adjudication of their claims of unfair methods of competition in interstate commerce in the forum of the Federal Trade Commission now appears to justify the belief of Congress when it created the Commission, that the public interest required the establishment of a tribunal for the maintenance of fair competitive conditions in industry. It is already demonstrable that the procedure of the Commission is most efficacious in a large number of cases where the concern against whom unfair methods of competition are being practiced has no remedy for the unlawful methods used against it, or is without means to enter into contest with the party practicing the same, or where the penalties or the remedies provided by the Sherman Law are inadequate. Moreover, the mere power vested in the Commission is an evident deterrent to industrial concerns from unfair competitive aggression against their weaker rivals in business."

TWO METHODS OF OPPOSING MONOPOLIES.

First: Sherman Anti-trust Suits.

We believe it will be readily seen there is a wide difference between (a) prosecutions for injunctive relief and for dissolution of the offending corporations, brought in the Federal courts under the Sherman Anti-trust Law, and (b) curative or preventive proceedings maintained before the Federal Trade Commission, sitting as a semi-judicial body. The distinctive quality consists in the difference between prevention and cure, i. e., between the fire extinguisher and the fire department. Absolute freedom in trade—undiluted competition—means the survival of

the strongest; it means the application in trade of the Malthusian theory that the weak or the ailing have no inherent right to exist; and experiences by the American people during the period subsequent to the Civil War prove only too convincingly that this doctrine, when applied in a radical way, breeds monopolies and "trusts." It is *regulated* competition which is "the life of trade;" whenever society permits trade rivalry to continue without state-regulation, such "competition" spells death instead of life; for all enterprises except the strongest in each line of trade it means ultimate extinction or absorption.

If this was true in the unregulated trade-era of the '70s, when the condition of American business proved a veritable incubator of "trusts"—how much more surely and rapidly might trade-restraints and monopolies spring into being in these later days, when enhancement of the nation's resources has brought into being aggregations with untold millions of capital at command or within call.

Subjected to the stress of maintaining a vigorous warfare against that powerful group, the Federal Department of Justice might consider itself (despite strenuous efforts) overwhelmed by sheer weight and numbers, and might "grow weary in well doing;" and public interest might thus suffer defeat through a default. Such a catastrophe would be disastrous and irreparable; for no individual citizen, however influential, could hope to maintain the people's cause against a combination of the powerful interests, which correspond to the "trusts" that formerly flourished and dominated entire fields in American commerce.

Let us be genuinely thankful that we now have a Federal Trade Commission empowered to issue its "cease and desist" orders while the prospective monopoly as yet has not gotten beyond the early stages of development; that we possess a public board equipped to act promptly and effectually in defense of the public's rights and interests.

Second: Preventive Measures as Administered by the Federal Trade Commission.

Prosecution and prevention! These words embody the very essence of two distinct theories; but, fortunately, they are not

opposed; each occupies a useful place in matters pertaining to trade-protection under the Federal Trade Commission Act.

If, as we trust and believe, the period of centralized control in trade is drawing rapidly to its close it follows that we have entered upon a new era of American trade history—the era of regulated competition. Let us hope this era, in its turn, will be succeeded by a higher, a more ethical spirit in commercial dealings; that *co-operation* at some not far distant day will bind all business interests together in friendly rivalry; and that the motto of commerce in the United States will be the motto of the “Three Musketeers”—“*One for all and all for one!*”

Men of large affairs have adopted and maintained a public-spirited and helpful attitude toward government during the stress and strain of the war-time period now happily ended—and this responsive disposition is a helpful sign of the times; for where regard for civic duties is present in mind, deliberate enthrallment of commerce by “trusts” and monopolies drops out of the calculation; and the anti-trust laws, (preserved, even though unused), may come at length to be regarded as a collection of antiquities in the armory of Federal statutes. If Americans stand shoulder to shoulder and continue to display the same willingness to serve which characterized their acts at home and abroad in the Great War, the future of the American Commonwealth is assured!

We must not weakly surrender the vantage ground already achieved nor permit old standards and conditions to return. The anti-trust laws have had a moral as well as legal value and effect upon the development of American commercial life and character; and they must remain, like the Federal Constitution, part of the law of the land; they must not (as some zealous iconoclasts propose) be expunged from the rolls of our Federal statute books; upon the contrary, those cautionary as well as curative laws must continue to exert a deterrent though silent influence by pointing out *the things that may not be done*.

Secretary Redfield in his address before the Chamber of Commerce of the United States, delivered at St. Louis (April 30, 1919), declared: “Nothing is more certain than that there has

been a great change for the better in the ethics and methods of trade since the anti-trust laws came into being. This conception of business * * * has established new business customs and higher business standards * * *."

Let us not pull down that enduring pedestal; rather let us build upon the sure foundation of the Federal anti-trust laws something, in the words of Horace, "more lasting than brass, more stable than the pyramids," by instituting and maintaining friendly co-operation and honest rivalry in commercial dealings.

PART THREE

CO-OPERATION THE WATCH-WORD IN WORLD TRADE

CHAPTER VIII.

Combinations at Outbreak of the World War.

Era of Combinations Worldwide.

The formation of combinations for the monopolistic control of production and distribution constituted one of the characteristic features of the economic life of all foreign countries of advanced industrial development during the quarter century preceding the World War. On the basis of a careful study of foreign combinations it is estimated that there were upward of 2,500 combinations for controlling prices or otherwise monopolizing industry and trade in the various countries of the world outside of the United States.

While the combination or "trust" movement has developed along more or less similar lines throughout the world, certain forms of organization have become characteristic for particular countries. Historical reasons, local conditions, economic, legal and other factors account for this. Thus in respect of the United States monopolistic combinations have become largely identified in the public mind with the so-called "trusts" (see page 24). In Great Britain industrial combination has assumed the amalgamation form primarily, as represented, for example, by the J. & P. Coats concern. In Germany the movement has been of an entirely different nature. The cartel form of combination has become typical there. Canada and Australia have on the whole followed the United States. In Sweden there is a noticeable tendency towards the amalgamation form, such as we find in Great Britain. Generally speaking, the combination movement in France, Belgium, Italy, Russia, Austria, Switzerland and the Netherlands has assumed the cartel or syndicate form.

GERMANY.

Prior to the war industrial organization, in the form of combinations for the control of production and distribution, had ex-

panded and penetrated into the economic fabric of commerce and trade on a larger scale and more deeply in Germany than in any other country of the world. It has been estimated that from 550 to 600 cartels were in operation in that country in 1911.

Characteristics of German Cartel.

The typical German cartel differs essentially from our so-called "trusts." A cartel is an organized group of competitors, co-operating under an agreement for a limited period of time and covering one or more of the following matters, viz., uniform prices, credits, discounts, regulation of output, allotment of orders, division of territory and standardization of quality. The individual participating unit does not lose its autonomy or independence, except in so far as it agrees to abide for a certain time by the terms of the joint cartel agreement. The average cartel resembles our American trade association in many respects. A more highly developed type of cartel with a central selling agency is called a "syndicate." The syndicate type of cartel is usually organized in the form of a stock company with limited liability. The Rhenish-Westphalian Coal Syndicate and the Steel Syndicate are two of the largest and most important industrial combinations in Germany. They have many points in common with our American "trusts." The former has for many years been the dominating factor in the production and distribution of coal throughout Germany. It was organized as a stock company in 1893, and in 1914 embraced sixty-seven participating members. The total production of coal by the syndicate amounted to 103,409,865 short tons in 1912. In 1914 the syndicate acquired control of the bulk of the coal transportation facilities along the Rhine and established an elaborate export trade machinery. Subsequently it succeeded in getting a dominant position in the wholesale and retail coal trade throughout Germany.

Centralized Control Dominates Important Industries.

The Steel Syndicate, organized in 1904, practically monopolizes the German steel industry. In 1912 its membership included

thirty-one companies, including all the German basic Bessemer (Thomas) steel works and a number of open-hearth steel works. While the Steel Syndicate controlled the so-called A products, viz., semi-finished steel, railroad material and structural steel, it did not succeed in getting control of the sale of the so-called B products (bars, plates, tubes, etc.). For some of the latter products independent price cartels have been formed.

The German electrical industry is well organized. About eighty per cent of the entire electrical business was controlled prior to the war by two companies, the General Electric Company and the Siemens-Schuckert concern. The activities of these two concerns assumed an international character. During the war a community of interest was established between them.

One of the main sources of strength of the German dye-stuff industry in the past has been the concentration of interests and the solidarity of efforts, which were based on a network of cartel agreements among the leading manufacturing concerns. Largely through this team work was the German chemical industry able to enlarge its financial foundation, to increase its efficiency and to maintain its high level of profits. In 1904 a community of interest was established for a period of fifty years between the *Farbenfabriken vorm. Friedrich Bayer & Co.*, of Elberfeld, the *Badische Anilin & Sodafabrik* of Ludwigshafen and the *Aktiengesellschaft für Anilinfabrikation* of Berlin-Treptow. According to the terms of that agreement the first two concerns were each to receive forty-three per cent of the joint profits, while the last concern was to receive fourteen per cent. A second community of interest was effected in 1904 between the *Farbwerke vorm. Meister Lucius & Bruning* of Höchst a. M. and the firm of *Leopold Cassella & Co.* of Frankfurt a. M. The joint agreement provided, among other things, for co-operation in patent and license matters, for joint purchase of raw materials and for joint establishment of plants in foreign countries. In 1908 the concern of *Kalle & Co.* became affiliated with this group. Both above-mentioned groups effected a still closer de-

gree of co-operation in May, 1916, through the formation of the "Anilinkonzern."

Organized Control Advances German Commerce.

The best informed authorities agree that Germany's success as a commercial and industrial world power prior to the war, aside from her large supply of skilled labor and efficient educational system, was due essentially to her policy of organizing and co-operating, of establishing communities of interest between the small and the big business men for the purpose of promoting trade at home and abroad. Closely linked together with her numerous cartels and syndicates, the great banks of Germany exercised a powerful influence in the commercial expansion of that country. The A. Schaaffhausenscher Bankverein, for example, for many years has been a controlling factor in the Rhenish-Westphalian district, the most important industrial district in Germany. It was closely allied with the iron and coal industry there, and with the textile and sugar industries of Saxony. Through interlocking directorates it was affiliated with fifty-five coal and iron concerns, and through its relation with the Dresdner Bank it was represented on the board of directors of twenty-five textile and thirty-six sugar concerns. As far back as 1903 it was connected with one hundred and sixty-three industrial enterprises in western Germany alone. This bank made a specialty of organizing and managing industrial cartels. For this purpose it formed a special syndicate department, the "Syndikatskontor," in 1889, which served as selling agency and clearing house for numerous important cartels, not only of Germany, but also of Austria-Hungary and other countries.

GREAT BRITAIN.

Amalgamation of competing concerns into one company has been characteristic of the combination movement in Great Britain in the past. Such well-known concerns as J. & P. Coats, Ltd., with a capital of £10,000,000, the Ebbw Vale Steel, Iron & Coal Co.; Bolckow, Vaughan & Co.; Guest Keen & Nettlefolds, are typical examples of where numerous, once independent

and competing concerns, have been fused into one consolidation. Consolidations are most familiar in the iron and steel, mining, chemical, soap and sewing cotton industries. A good example of such a consolidation is afforded by the history of a concern which at present controls at least ninety per cent of the whole British production of the commodity on which it is engaged. It grew out of an organization formed thirty years ago by two large manufacturers who agreed to form a central organization to control the distribution and sale of their various lines in home markets. Seven years later, the two original concerns were amalgamated and later a control in other firms was acquired. Of the establishments now included in the consolidation one class engages in domestic trade and in export trade to those foreign countries which are not directly served abroad. The second class embraces establishments in foreign countries which belong entirely to the consolidation. The third class comprises establishments in other foreign countries which are owned jointly by the consolidation and by other persons in those countries. The selling prices for all markets catered for by the mills of the first two classes are regulated from central headquarters in Great Britain. The companies in the third class fix their own prices after studying the conditions in their respective markets and consulting headquarters as to the effect which the prices may exercise upon other markets.¹

Prevailing Types of Combines.

The numerous consolidations which have been formed in Great Britain are either "horizontal" or "vertical." The former comprise concerns engaged in the same stage of industrial production or in approximately corresponding stages in respect of a number of allied products. "Vertical" consolidations comprise concerns engaged in successive stages of production, e. g., coal and iron mining, pig iron, steel, shipbuilding.

Numerous other types of combinations for regulating trade have grown up in Great Britain during the last twenty years,

¹Great Britain. Ministry of Reconstruction. Report of Committee on Trusts, op. cit., p. 19.

which are more in the nature of the German cartels and syndicates. These "combines," as they are commonly known, are associations for regulating output, fixing prices, joint tendering arrangements on contracts, etc. In the iron and steel industry there are thirty-five such associations, comprising approximately three hundred and thirteen firms. The Committee on Trusts enumerates ninety-three associations, and makes the statement that "the fact is that Free Competition no longer governs the business world * * *. We find that capitalist combination, in one or other form, and at one or other stage of production, transportation and distribution, now loads in varying degrees the price of practically everything that we purchase."¹

Example of English Trade Control.

An example of a more highly developed and centralized combine which practically controls the whole of an important industry is as follows:

"Twenty years ago the industry comprised some seventy independent firms distributed all over the country. In 1900 arrangements were made for the formation of a limited company to acquire twenty-seven of these businesses. The issued share capital of the acquiring company was approximately £7,000,000. These twenty-seven firms represented 40 per cent of the national output. In 1912 a second company promoted by the first to acquire thirty-two other firms not included in the original combine. The issued share capital of this second combine was nearly £4,000,000. The purchase of the businesses taken over was effected partly by outright sale of the works concerned, in which cases the original companies were wound up and now trade in common as units of the second combine, and partly by the purchase of controlling interests, in which cases the concerns still trade as separate businesses usually under their original name. The first combine holds 70 per cent of the shares in the second, and is represented on its directorate by ten members of its own board, but the two trade as distinct concerns. The two together cover 80 per cent of the total capacity of the industry. As for the remaining 20

per cent, there have for many years been local alliances concerned with settling for the districts concerned all terms and conditions of trade, and recently a federation comprising the two combines and the outside alliances has been formed. With this final stage of development the whole of the combined and associated groups in the trade are brought into close co-operation."¹

In discussing British trade organization the above-mentioned report says:²

"In this country great consolidations have hitherto been less formidable than in America, and associations of independent manufacturers have in no single case been developed to anything like the same logical outcome as in Germany. Yet it should not be too readily assumed that British industries lag far behind those of other countries in effectiveness of internal organization. Individuality has counted for more in British manufacture than in foreign, and if amalgamation has proceeded cautiously there has been reason in the caution. British combines and consolidations may not rank as prodigies, but among them are some that can vie in efficiency with any in the world. British trade associations make little parade of their existence or achievements, but there are few corners of British industry in which some kind of trade association is not to be found, and some of them can show a thoroughness of organization not easily surpassed. What is notable among British consolidations and associations is not their rarity or weakness so much as their unobtrusiveness. There is not much display in the window, but there is a good selection inside."

Prevailing Trade Sentiment Favors Combination.

The extent of the combination movement in Great Britain may be realized from the following statement in the Report of Committee on Trusts (page 20):

"Associations concerned with the regulation of price or output, or both, are to be found in almost every branch of British industry. Their number cannot be computed, for many are not registered either as companies or trade unions, and some are purposely carried on as secretly as possible. It may be taken, however, that there are considerably more

¹l. c. p. 19.

²l. c. p. 17.

than five hundred associations, all exerting a substantial influence on the course of industry and price in being at the present time in the United Kingdom."

AUSTRALIA.

The trust movement in Australia offers several distinct and noteworthy features. The centralization of industrial and financial control in a few large cities, the active and intelligent interest taken by the public, so keenly jealous of its rights, in respect of modern industrial movements, advanced anti-trust legislation and frequent public inquiries of monopolies—all these factors combine to make Australia a most satisfactory country to study industrial combinations. Notwithstanding repressive laws and the application of drastic measures for checking monopolistic exploitation of the public, we find that combinations for fixing uniform selling prices, for dividing territories and for suppressing competition generally, honeycomb commerce and trade. The whole of the sea-borne interstate transportation is controlled by a combination consisting of seven shipping companies. The Colonial Sugar Refining Company owns and controls all the sugar refineries of Australia with the exception of the one owned by the Victorian Government and one other small concern. According to the report of the Royal Commission the price of refined sugar is, for practical purposes, fixed by the above-named trust, which also owns about one-third of the cane-crushing mills in the State of Victoria and in addition has a complete monopoly of the New Zealand sugar trade. A similar situation exists in the coal industry and trade. The Newcastle Coal Vend, which is a combination of all the principal coal mine owners in the Newcastle district, New South Wales, occupies a particularly strong position in the coal market of Victoria, South Australia, West Australia and Queensland by reason of its close co-operation with the Associated Interstate Shipping Companies. The latter acted originally merely as carrier of coal. Then they established coal depots and became dealers, and finally were made the sole purchasing agents of the Newcastle Coal Vend.

From seven-eighths to nine-tenths of the Australian tobacco trade is in the hands of the British American Tobacco Company, which operates through the British Tobacco Company (Australia), Ltd., and other Australian subsidiaries. It fixes the prices to be paid to the leaf grower and controls the distribution of tobacco to retailers. In addition to the above-named large "trusts" numerous other combinations have been formed, smaller in size but not less important factors in respect of the particular industry in which they operate. The Timber Merchants' Association, the Printers' Combine, the Dried Fruits' Association of Australia, the Victorian Flour Mill Owners' Association, the Nail and Barbed Wire Combine and the Jam Combine are among the combinations which through their organized and concerted efforts to control production and distribution exercise a more or less monopolistic effect upon the commerce and trade of Australia.

FRANCE.

In all the important industries of France combinations for controlling production and distribution have been in operation with more or less success for many years, notwithstanding the fact that the French civil and criminal codes contain provisions against industrial combinations. Prior to 1914 upwards of 100 combinations were known to have been formed in France. Such as have a more highly developed form of organization with a central selling agency are generally known as "comptoirs." They correspond to the German "syndicate." One of the best known is the Comptoir Metallurgique de Longwy, organized in 1876. It is composed of eighteen participating concerns, the capacity of whose plants comprised more than thirty per cent of the total French production of pig iron prior to the war. Closely co-operating with this combination, the Comptoir d'Exportation des Fontes de Meurthe-et-Moselle handles nearly three-fourths of the exports of pig iron from France. The French coal producers are equally well organized. Prior to the war the French coal producers, just like the German, paid bounties for sales to foreign countries. Numerous combinations flourished in the large

French textile industry, covering cotton print goods, cotton, flax, hemp and tow spinning and various branches of the silk business. Among manufacturers, wholesalers and retailers throughout France price agreements are effected in great number. And this is the case in virtually every line of commerce and trade, including so-called French specialties and quality goods, for example, toilet preparations, perfumery, etc.

OTHER COUNTRIES.

Of the smaller European countries, Belgium was preeminent before the war for the great number of industrial combinations. There were comparatively more combinations in Belgium than in any other country of the world. The fact that Belgium competed so successfully with her former strong rivals in international trade was due in large measure to the effective organization of her business interests and the resulting high degree of commercial solidarity.

The commercial expansion of Switzerland was based largely on a similar foundation. Although handicapped in many ways by natural conditions in their mountainous country, her manufacturers and exporters, nevertheless, succeeded in placing watches, embroidery, silk goods, chocolate, machinery, etc., in the front rank through efficient co-operation, coupled with indomitable energy, tenacity and skill in commercial organization.

In the Netherlands and in the Scandinavian countries, as well as in Italy and Spain, numerous strong combinations have exercised a monopolistic control of trade and commerce for many years. The strongest organizations are to be found as a rule in the heavy industries, iron, steel, coal, machinery, etc., but also in certain lines of manufactures, like textile goods and food products. Combinations for fixing prices, credit and sales terms, for allotting orders, etc., are found in almost every line of industry and trade in spite of repressive laws.

A similar situation obtained in Canada, in the industrially more advanced countries of Central and South America and in Japan and China.

CHAPTER IX.

Effect of the World War on Industrial Combinations.

The unprecedented and intensive economic mobilization in the leading commercial countries, which set in soon after the outbreak of the great world war, gave a quickened impetus towards co-operation of economic interests throughout the world. While it is true that this movement toward syndication crystallized to a large extent around temporary war measures, most of which have already terminated or will terminate sooner or later, numerous other forms of economic co-operation and syndication of a monopolistic nature have grown up which must be recognized as permanent institutions. Unquestionably this whole modern movement, covering temporary as well as permanent tendencies of monopolistic control, will exercise a marked influence upon national and international commerce and trade in the future. Nationalization of industries, government control and regulation of trade, and voluntary and compulsory trade associations are subjects which the war has shifted from the realm of theory into that of actual experience on a scale that would have appeared visionary but a decade ago.¹

Movement in Territory of Central Powers.

In the years before the war, the desire to establish uniform prices and to avoid competition within an industry or trade was, on the whole, the main motive that actuated purchasers and dealers to form cartels, syndicates or trusts. The great increase in the number of trade combinations during the war was due to a number of other considerations which have grown out of war-time conditions. They varied somewhat in the different coun-

¹See "Cartels during the war" by William Notz, in *the Journal of Political Economy*, January, 1919, vol. 27, No. 1, pp. 1-38.

tries. In Germany and Austria a dearth of raw materials and the necessity of finding suitable substitutes acted as a stimulus for closer co-operation within certain industries which, before the war, procured their supply of raw materials from foreign countries. The scarcity of fuel and the resulting shutdown of factories led to a syndication of interests in other industries for the purpose of safeguarding their supply and distributing the available quantity of coal equitably. The effort to protect common interests against the encroaching control of the state authorities has proved to be a strong stimulus in Germany towards the voluntary formation of cartels during the war. In many cases the antagonistic attitude of the government was said to be due to selfish price manipulations on the part of cartels. In several instances compulsory syndication and even a state monopoly caused private interests to seek greater solidarity through voluntary syndicate organization for the protection of their trade interests.

Foreign Trade Interests Influence England and United States.

Direct encouragement by government authorities has unquestionably, more than any other factor, promoted the formation of trade combinations since 1914 in all the leading commercial countries of the world. This is most noticeably the case in Great Britain and in the United States, where it had its inception chiefly in the desire to promote foreign trade. The widespread attention given to the investigations of the United States Federal Trade Commission into foreign trade conditions¹ focused public attention here and abroad particularly on the efficiency of trade combinations in export trade. The dislocation of foreign trade conditions incident to the war, the temporary elimination of Germany from overseas markets and of German interests from domestic corporations, the opening up of new markets and especially the problem of export trade after the war—all these factors combined to make the question of foreign trade expansion an issue of national rather than private interest. "Co-operation in export trade" became a winged word.

¹U. S. Federal Trade Commission. Report on cooperation in American export trade. Washington, G. P. O., 1916, 2 vols.

Congress Legalizes Combinations for Export Trade.

In the United States the Webb-Pomerene Law was enacted by Congress and approved April 10, 1918. With certain restrictions associations for engaging in export trade were made lawful under this act. In Great Britain special departmental committees appointed by the President of the Board of Trade made inquiries into many of the most important and staple trades, and most of these committees recommended that British manufacturers should form combinations.¹ The Committee on Commercial and Industrial Policy after the war in its final report issued in 1918 stated as follows:

It is in our view necessary that in some important directions the individualistic methods hitherto mainly adopted should be supplemented or entirely replaced by co-operation and co-ordination of effort in respect of (1) the securing of supplies of materials, (2) production in which we include standardization and scientific and industrial research, and (3) marketing (page 34).

We are of opinion that every encouragement should be given by the government to the formation of combinations of manufacturers and others concerned to secure supplies of materials, and that, where it appears expedient that the control of mineral deposits in foreign countries should be obtained, all practicable support should be given (page 37).

We believe that such development (the formation of combinations for export trade) is not only desirable in some cases, but is practically inevitable under modern economic conditions, and we think that the attitude of public opinion, of local authorities, and of the State, which, broadly speaking, has hitherto been more or less avowedly antagonistic to the very principle of combination, must be modified (page 39).

The Garton Foundation made the following recommendation:

Industrial concerns will need to unite for the joint cultivation of foreign markets, sinking their individual rivalries and jealousies in the common object, receiving much

¹Great Britain. Board of Trade. Report of the Committee on the Engineering Trades after the War, p. 26; Report of the Committee on the Iron and Steel Trades after the War, p. 45; Report of the Committee on the Textile Trades after the War, p. 179; Report of the Committee on the Electrical Trades after the War, p. 8.

more active aid from the Board of Trade and the Consular Service than has hitherto been given.¹

Efficiency Through Combination Wins England's Support.

A subcommittee of the Advisory Committee to the Board of Trade on Commercial Intelligence, which was required to report in what industries it would be desirable that efforts should be made to induce manufacturers to combine or federate for the promotion of their joint interests in export trade, reported in favor of combinations. It found that the German cartel and the American and Canadian amalgamation systems were able to provide in a more effective manner than individual traders for the distribution of orders in such a way as to permit of the greatest possible amount of specialization by each plant, for branch offices holding stocks in export markets, for representation of individual manufacturers, for reduced selling costs; and for long-sighted advertising and development campaigns.

The Board of Trade accepted the report, which recommended that the Board should defray part of the cost of the dispatch by such associations of expert investigators to approved overseas markets, and furthermore, that when desired the Board should appoint officers to attend the meetings of the executive committees of such export associations in an advisory capacity. Arrangements were made at once for a joint investigation by the Department of Overseas Trade and representative associations of the jewelry, silverware, electroplate and allied trades of the South American markets.²

It is interesting to observe that the activities of the Board of Trade in promoting combination among manufacturers and exporters have encountered considerable criticism and opposition.³ It is argued that the policy advocated by the Board of Trade "is socialistic, is being carried on in the face of protests from chambers of commerce and from merchants, who naturally object to money paid by them in taxes being used for the ruin of their own business."

¹Memorandum on the Industrial Situation after the War (London, 1916), p. 58.

²Board of Trade Journal, Feb. 21, 1918, p. 208.

³The Economist, 1917, p. 868; 1918, pp. 249, 335 ff.

Organization Officially Recommended for Canadian Trade.

In Canada the acting Commissioner of Labor, W. F. O'Connor, in discussing present and future trade conditions in that country, advocated the formation of selling combinations on the plan of European export cartels, as follows:¹

As a result of war conditions Canada is now selling all she can produce, but we ought to organize so that we may sell with efficiency, as after the coming peace the powers now clamouring at our counters may require to be coaxed or informed. Canada's industrial equipment is said to be of a capacity twice or three times more than its home trade requirements demand, and only by greater export trade or through the extension of the home market by an abnormal immigration can extensive scrapping of plants be avoided. Production is not enough; what is produced must be sold. Efficient selling will reduce the cost of selling, and not only the manufacturer but the consumer will gain. Labour also will benefit through the greater volume of employment afforded through the export orders which efficient selling organizations will secure. A board or commission with jurisdiction over trade combinations and trade methods is therefore as much a necessity for the purpose of foreign trade as for internal trade.

War conditions have given rise to still another fertile cause for the concentration of commercial interests. The accumulation of considerable capital during the war in certain quarters in neutral countries, where fortunes have been made in an incredibly short time, made possible heavy investments in productive enterprises. Well-financed concerns absorbed smaller ones, especially in the Scandinavian countries. This accounts for the comparatively large number of amalgamations formed in Sweden, Norway and Denmark during recent years. Similar developments may be observed in Holland, Switzerland and Spain. An unprecedented growth of big business as a result of the war, together with active government support in the form of subsidies, tariff adjustments, etc., have materially quickened the process of industrial and trade syndication in Japan, where

¹The Labour Gazette, Ottawa, June, 1917, p. 477.

commercial organizations had been highly developed prior to the war.

Last but not least, concentration of demand has proved a vital factor in furthering the tendency towards combinations. Maximum efficiency in the placing of large government contracts for war materials of all kinds made joint action on the part of manufacturers or dealers a matter of great importance to the public interest. In numerous instances government authorities had advised producers or manufacturers in certain industries to combine, so that contracts for supplies could be allocated more efficiently.

GREAT BRITAIN.

The world-wide impetus given to the combination movement by the new economic conditions produced by the war is most noticeable in Great Britain. While large trust-like concerns, such as the Cambrian Coal Combine, the Coats Combination, etc., as well as smaller price-fixing combines, have existed in Great Britain for many years, British manufacturers always showed a pronounced tendency toward individualism, and public opinion was more or less antagonistic to monopolistic enterprises. A marked change has taken place. Official committees declare themselves unqualifiedly in favor of combinations. The Departmental Committee appointed by the Board of Trade to consider the position of the engineering trades after the war, declares:

We ourselves approve of trade combinations amongst manufacturers, as we also approve of combinations among workmen.

The Committee on Electrical Trades reported:

It is essential that output should be thus consolidated instead of remaining in the hands of a number of weak concerns, many of which, moreover, have further reduced their competitive power by dabbling in a variety of productions.

Trade Combination as "Considered Policy."

According to the Economist¹ the Board of Trade has adopted the promotion of trade combinations as its "considered policy."

¹December 1, 1917, p. 868.

A survey of the reports of annual meetings of some of the leading British industrial concerns for the past three years shows that co-operation among producers or dealers, a joining of like interests in the form of amalgamations, fusions or pools and similar developments along lines of syndication for domestic as well as export trade have taken place on a large scale.

According to the report of the Committee on Trusts presented to Parliament by the Ministry of Reconstruction in 1919, there were thirty-five associations connected with the British iron and steel industry, comprising a total of more than three hundred and thirty-three individual firms. Nearly all of these associations are definitely known or believed to be engaged in regulating price and output. Another prominent instance of industrial organization in Great Britain is the chemical industry which is ancillary to a wide range of other industries. With the aid and active financial backing of the government, the two great consolidations which controlled the British dye industry were recently merged into a new concern, British Dyes Limited. In the electric industries there is an association with a total capital of 33,000,000 pounds. In soap, tobacco, wall paper, salt, cement and in the textile trades there are also powerful combinations which are in a position effectively to control output and prices. The report of the Committee on Trusts states as follows:

We find that there is at the present time in every important branch of industry in the United Kingdom an increasing tendency to the formation of trade associations and combinations, having for their purpose the restriction of competition and the control of prices. Many of the organizations which have been brought to our notice have been created in the last few years, and by far the greater part of them appear to have come into existence since the end of the nineteenth century. There has been a great increase in the creations of trade associations during the period of the war (page 2).

Two instances of successful British export associations are mentioned in the report, viz.:

Our trade covers markets in every part of the world, differing in climate, language, coinage, purchasing power of

the population, popular taste and so on. It follows, therefore, that the manufacturer requires to be served by highly trained, educated men, who have made a special study of their subject. We have established an extensive Expert Selling and Advertising Organization through which they have been able to obtain exact information as to the peculiarities and requirements of each market abroad. This organization has been placed at the disposal of the manufacturers associated with us, and the result has been that British goods have been exported to outlying districts in various parts of the world at prices within the purchasing power of the various populations who are themselves better served than if each individual firm were trying to do the trade direct, with all its difficulties and expense. By means of the economies effected by association and with the advantage of the organization already built up, the associated companies have been able to increase largely their export trade. The value, therefore, from a national point of view of the extension of this organization to the associated businesses will be obvious, as by this export trade is obtained the ideal of exchange of British manufactured products for the imported raw materials used in their manufacture. There is also the advantage that the Association Companies can show their samples in the various branches and sales-rooms that have been established abroad by us, whilst their interests in regard to trade marks and Custom House, Shipping and Banking requirements can be protected by the one organization.

A central export department with specially trained staff has been set up, direct representatives are sent to overseas markets, attempts are made to study the markets of the world on a large scale and direct touch is endeavored to be obtained with all avenues of trade opened up by the Chamber of Commerce, the Board of Trade, the Overseas and other Associations, selection of suitable samples for each market are made from the combined productions of the Company instead of reckless general and oft-time resultless sampling of every mill's productions regardless of the needs of the particular market involved (page 23).

Co-operation Promotes British Export Trade.

The same report mentions ninety-three associations, covering a great variety of industries, with which the Ministry of Muni-

tions had experiences in the course of the war. The report goes on to say that there was a general agreement among representatives of associations heard by the Committee that one of the beneficial results of the formation of associations sufficiently powerful to control and maintain prices in the home market was that it enabled British manufacturers to extend their output by selling their products at a lower price, or even at a loss, in foreign markets. The chairman of an important metal association is quoted as having said:

By securing remunerative prices in the home market through restriction of competition they could make a successful bid against foreign competition in the export trade. They had a fund, a fighting fund, for the special purpose of subsidising members who found it necessary to sell at less than an economic price in order to cut out foreign competitors. (l. c. p. 7.)

Shortly after the outbreak of the war, Sir Edward Grey voiced the view generally prevailing in British official circles as well as among businessmen and others interested in commerce and industry as follows:

If we want to capture trade in neutral markets we must see to it that we have high production instead of low. The other want of ours is industrial organization. Without these we cannot successfully compete with American and German industries, which, owing to their own superior method, work en masse. We are far too individualistic as a rule. We have to combine to hold our own.

This appeal for concerted effort for solidarity of trade interests at home and for co-operation in meeting foreign competition appears to have found a responsive audience. From that time on economic unification of the different industries of Great Britain, and on a large scale economic nationalism of the business interests of the whole empire became the watchword and gave a new direction to the commercial policy of the nation.¹

¹W. B. Colver "Recent phases of competition in international trade," in *the Annals of the American Academy of Political and Social Science*, May, 1919, pp. 233-48.

GERMANY.

The situation in Germany as regards industrial combinations exhibits a number of interesting features. Prior to the war commerce and trade were more highly organized in Germany than anywhere else in the world. Approximately six hundred cartels had been formed prior to 1914.¹ Most of the German cartels, however, were more of a co-operative nature, consisting mainly in voluntary price agreements, divisions of territory and allotment of output. Capitalistic combinations similar to our American trusts were comparatively few in number. The Rhenish-Westphalian Coal Syndicate, the steel syndicate, the potash syndicate, the community of interests formed in the electrical and in the dye-stuff industries were models of efficient organization and operation. During the war elaborate plans had been worked out for welding together still closer the industrial and trade interests of the country. They were all predicated, however, on an effective conclusion of the war on the part of Germany. The political and industrial upheaval which followed the signing of the first armistice terms rendered futile all these plans. Her largest cartels which during the quarter of a century preceding the war constituted the backbone of Germany's commercial and trade enterprises in foreign countries were threatened with dissolution. On the other hand, a strong movement towards nationalization of most of the basic industries has sprung up. To all appearances the future of German industrial development will be shaped materially along the lines of state ownership.

In accordance with a so-called "self-government" scheme of industrial organization, planned by the former Minister of Industry Wissell and his under-secretary von Moellendorf, three of Germany's most important industries, potash, coal and iron-steel, have been reorganized. The scheme provides in substance for compulsory combination in the form of a cartel of all companies and firms in a particular branch. The cartel does the actual executive and trading work, while over the cartel is a

¹U. S. Federal Commission. Report on Co-operation in American Export Trade, op. cit. Pt. I, p. 103.

council of delegates from producers, traders and consumers with equal representation in each of the three groups of capital and labor. The State, through the Ministry of Industry, retains a right of supervision and in some matters of veto or sanction. The new iron combine is called "Eisenwirtschaftsbund."

TRADE COMBINATIONS IN FOREIGN COUNTRIES.

Outside of Great Britain and Germany the most significant developments in other European countries in connection with cartelization of commerce and trade during the war may be observed in the Scandinavian countries, in Russia and in Italy. The rapid accumulation of wealth in Sweden, Norway and Denmark has led to the absorption of numerous small concerns by well-financed corporations. In Sweden several export cartels have been formed. In Italy the elimination of German interests, which had been closely linked up with the leading Italian cartels, resulted in a general reorganization of the industrial administrative machinery of the country. Perhaps the most important recent development in Italy's industrial expansion is the action of the Minister of Finance, Nitti, who in July, 1918, arranged a general agreement between the four greatest commercial banking institutions of that country, the Banca Commerciale Italiana, the Credito Italiano, the Banca Italiana di Sconto and the Banca di Roma, to underwrite the bulk of the new capital stock issued by the Ansaldo works of Genoa. This large shipbuilding, engineering and armament concern increased its capital from 100,000,000 to 500,000,000 lire. It has now become the strongest industrial interest of any kind in all Italy, constituting practically a trust in its line. In Russia the Soviet government has promulgated a decree nationalizing foreign trade.

Australia Plans After-War Organization of Commerce.

In Australia the Prime Minister, in February, 1918, outlined to the Chamber of Manufacturers at Melbourne a scheme for the organization of Australian industry and trade after the war.

He stated that the unit of the scheme would be the association representing each industry. This shall be composed of all the producers or manufacturers of an industry forming themselves into an association. Representatives from the various associations shall compose a General Council of Commerce and Industry. Combined action of manufacturers through an association for the purpose of securing a footing in overseas markets was proposed and the backing of the Commonwealth to secure necessary credits from banks was mentioned as a means of pushing the Australian products in the overseas markets.

Japan Excels in Marshalling Industrial Interests.

In Japan organization of business has made rapid strides during the war. The solidarity of her business interests, the co-operation of her exporters, the systematic aid furnished manufacturers by the government through subsidies, tariff legislation, etc., is unequaled anywhere among the other commercial nations of the world. Japan's shipping has virtually monopolized the Pacific maritime trade during the war. Three shipping firms of Kobe recently pooled their interests. The new concern stands fourth in the list of Japanese shipping companies. Well-organized cartels have been formed in the textile, tea, chemical, camphor and other industries. In Canada there was incorporated a company styled "The Associated Industries of Japan," with head office at Vancouver. This company comprises some one hundred and sixty Japanese manufacturers. An enterprise on a larger scale was formed by six of the largest mercantile firms of Japan, the Mitsui, the Mitsubishi, the Okura, the Furukawa, the Kubara and the Kogyo Kaisha, for the purpose of placing joint loans in China. The new combination has already succeeded in acquiring certain valuable mining privileges.

Canada Joins in the March Toward Trade Consolidation.

In Canada the trend towards combination evidences itself in the recent organization of two huge concerns eclipsing all previous efforts in the realm of industrial consolidation. Nine Canadian steel, coal and transportation companies were recently merged

into the British Steel Corporation, with a capital of \$500,000,000. British and Canadian interests combined in the formation of this enterprise, which is said to represent the largest merger of its kind in the British Empire. In another branch of Canadian industry, pulp and paper, a merger has been effected which embraces the large Riordon, Edwards, Gilmour and Hughson interests. The parties involved are said to control 12,000 square miles of forest areas.

France and Belgium Show Similar Trend.

Co-operative purchasing bureaus have been established in Belgium under the auspices of the Belgian Ministry of Reconstruction. In all fifteen such central purchasing bureaus have been formed.

In France purchases for the restoration of the French liberated districts are made through the Central Purchasing Bureau of the Liberated District. A presidential decree of August 25, 1919, increased the capital of the Bureau from 7,000,000 to 100,000,000 francs.¹

TRADE ASSOCIATIONS.

Side by side with the world-wide tendency to form cartels, syndicates and trusts, a rapid growth has been taking place during the war in the number and size of trade associations. Industries in which all efforts to bring about an organization failed in previous years have been successfully organized under the stress of war times, not only along sectional lines, but as units covering the entire national industry. In the United States the coal and the dye-stuff industries have for the first time been organized into national associations. Numerous new associations of manufacturers, of wholesalers and of retailers have grown up throughout the country, partly as a result of governmental pressure, and many of the older existing associations have taken

¹Journal officiel, August 27, 1919.

occasion to establish a greater degree of solidarity and more efficient co-operation among their members.

A similar movement can be distinguished in Great Britain. The largest organization of this kind established in that country is the Federation of British Industries, which comprises more than sixteen thousand manufacturing companies with a total capital of twenty billion pounds. The prime object of the federation is to promote British trade prestige in overseas markets.

In Australia, in Canada, in the Scandinavian countries and in Japan concerted action on the part of trade associations is noticeable and numerous associations and federations for defensive and aggressive purposes have been formed in those countries during the past decade.

Objectionable activities on the part of trade associations in different countries have given rise to criticism on the part of the public as well as of government authorities and closer supervision of their activities has been advocated. Regarding conditions in the United States, the Federal Trade Commission in its "Report on the Book-Paper Industry" (Washington, 1917, page 18) says:

The commission also desires to call attention of the Congress to the necessity for the enactment of legislation regulating the activities of trade associations. The print paper and other investigations of the commission show that trade associations, although they are presumed to be organized for legitimate purposes, and are often engaged in activities which serve a useful purpose, nevertheless, in some instances, engage in practices which tend to destroy competition and defeat the objects of the Sherman Law.

Price-Fixing Through Associations.

A practice of suppressing competition through price-fixing associations receiving daily reports of sales of principal members dealing in certain commodities, has grown up in the United States, and has assumed large proportions. Owing to the fact that only past or "closed" transactions are called for and considered, the belief has become quite general that the anti-trust

laws do not apply to this system of eliminating competition and standardizing prices. The effect has been to intimidate dealers who wish to reduce prices; and a virtual restraint of trade has resulted in numerous industries.

In order to correct these abuses and overcome this attempt to circumvent the Sherman Law, the Federal Department of Justice has conducted an investigation and an anti-trust suit has been brought. The Federal court¹ (March 16, 1920) has sustained the Government (*U. S. v. American Column & Lumber Co., et al.*, 263 Fed. 147, and no doubt other actions will be instituted to terminate such price-fixing.

¹In the District Court of U. S., Western District of Tennessee, Western Division.

CHAPTER X.

Organization of Export Trade in the United States Prior to the Enactment of the Webb-Pomerene Law.

Understandings Among American Export Interests.

Combinations of manufacturers or others for exporting goods to foreign countries from the United States have been in operation openly only since the passage of the Webb-Pomerene Act in April, 1918. Apparently agreements or understandings among American business men as to prices, sales terms, etc., for export trade have existed in a number of instances prior to the enactment of that law, but fear of prosecution under the Sherman Anti-trust Act obviously prompted all parties so engaged to observe the utmost secrecy. Moreover, so long as our exports consisted chiefly of raw materials and foodstuffs, there was little difficulty in finding foreign markets and virtually no competition was to be encountered. The rank and file of American manufacturers shipped their exports through brokers and export commission houses. With few exceptions only the largest shippers have been able to develop a direct export organization, with salesmen and branch houses in foreign countries, to undertake expensive foreign campaigns.

Corporations Became Pioneers in Our Overseas Trade.

A large share of the success of the United States in exporting manufactures has been due to the efforts of large corporations. The Standard Oil, United States Steel, International Harvester and other large industrial concerns have established export organizations of their own which encompass the world's markets. The International Harvester Corporation, prior to the war, carried on its business in Europe, Western Africa and Asia from four centers, viz., London, Paris, Hamburg and Moscow.

It operated manufacturing plants in four European countries, employing approximately five thousand seven hundred people, and maintained numerous branch offices which were managed from the above-named four centers. In Russia, for example, it had twenty-five branch offices; in France, six. Its manufacturing concerns operated in foreign countries and were incorporated under the laws of the respective countries where they were located, the International Harvester Corporation of this country retaining control of the various foreign subsidiary plants by having a majority of directors on the board of directors of each company. Large plants are operated also in Canada and Australia, while the American corporation's network of warehouses, assembling and distributing plants and agencies in other parts of the world aggregate a large number. The Singer Manufacturing Company, which handles over eighty per cent of the world's output of sewing machines, and the Singer Sewing Machine Company, its distributing agency, the General Electric Company, the Remington Typewriter Company and the Corn Products Refining Company are other examples of large corporations which have built up an extensive export organization of their own, with agencies, warehouses, etc., in all parts of the world. The United States Steel Company and subsidiary companies exported their finished and unfinished products through the United States Steel Products Company which had thirty-one branch houses abroad.

Handicap of Smaller Interests in Foreign Trade Field.

While large American manufacturing concerns had ample facilities for building up and maintaining efficient export organizations of their own, small manufacturers found themselves handicapped in many ways. The individual small manufacturer lacked the financial resources necessary to develop a foreign market. Singlehanded it was frequently impossible for him to meet prices quoted by competitors in foreign markets, or to procure credit and other information concerning foreign customers or prospective buyers and foreign markets. On the other

hand, his foreign business rivals were more favorably situated. In virtually all the leading commercial countries of the world, excepting the United States, combinations among producers and distributors for export trade were either lawful, or where repressive laws existed they were not enforced. In many lines of export trade the American exporter singly had to meet and cope with groups of competitors. The economy, uniformity, knowledge and efficiency which resulted from the co-operative action of his competitors was denied the American business man under the Sherman Anti-trust Act. During the decade preceding the war the activities of foreign commercial and industrial combinations and their importance as a competitive factor in world trade became more and more recognized in the United States. When the world-wide drive for export markets set in, shortly after the outbreak of the war, public attention in this country became focused on foreign cartels and syndicates and a strong movement set in advocating the enactment of legislation making it lawful for American business men in export trade to co-operate.

Trade Commission Investigates and Reports.

In response to this sentiment, the Federal Trade Commission undertook an extensive investigation of competitive conditions affecting Americans in international trade. It reported the results of this investigation to Congress on June 30, 1916, in its "Report on co-operation in American export trade." The Commission found:

1. That other nations have marked advantages in foreign trade from superior facilities and more effective organizations.

2. That doubt and fear as to legal restrictions prevent Americans from developing equally effective organizations for overseas business and that the foreign trade of American manufacturers and producers, particularly the smaller concerns suffers in consequence."

In pointing out advantages enjoyed by foreign exporters, the Commission called attention to the fact that while the United

States had been absorbed in domestic developments, other nations followed definite policies for the expansion of their foreign trade and perfected efficient means to carry out this purpose. In Great Britain, Germany, Italy, Switzerland, Holland, Sweden, France, Belgium, Japan and certain other countries, numerous powerful combinations existed which effectually unite their activities both in domestic and foreign trade. These groups of foreign concerns are in part backed by great banks, aided by railway and shipping lines, and assisted by their governments. In addition to combinations of producers, numerous well-organized combinations of buyers and importers confront American exporters in overseas markets which attempt to make individual American producers bid against each other.

Report Discloses Impediments to American Export Trade.

The Commission's report goes on to say that:

"If Americans are to enter the markets of the world on more nearly equal terms with their organized competitors and their organized customers, and if small American producers and manufacturers are to engage in export trade on profitable terms, they must be free to unite their efforts."

"Without any export organization, foodstuffs and raw materials can readily be sold at some price, but to avoid needless expense in distribution, to meet formidable foreign buying organizations, and to insure profitable export prices, co-operation among American producers of such commodities is desirable.

"In the sale of factory products, co-operation is even more desirable. Such goods must be advertised, demonstrated and a market created abroad, often in the face of the keenest competition from great combinations of foreign manufacturers. Obviously only strong organizations can undertake this contest. If groups of American manufacturers and producers either of competing or of non-competing goods can combine their efforts, they can share the cost of developing new markets, establish themselves firmly, extend credit more readily to foreign customers, and compete more successfully with foreign syndicates and cartels." (Pt. 1, p. 8.)

Commission Suggests Means of Relief.

The Commission's report then goes on to discuss the need of properly safeguarding prospective legislation in order to prevent certain possible misuses. The report continues as follows:

Two chief dangers from co-operative export organizations of American manufacturers and producers are apparent. They may be used to exploit the home market and they may be used unfairly against individual American exporters. These dangers must be faced frankly and provided against fully.

The Commission is confident that this can be done without sacrificing the essential advantages of joint action and without altering the policy of the anti-trust laws or interfering with their enforcement.

The only danger to the American consumer would arise if export combinations were to restrain trade in the domestic market. In order to make it difficult for export combinations even to attempt restraint of trade in the United States, the right to co-operate or combine should be limited to the export trade solely, and administrative supervision should be provided to insure that such organizations are not used surreptitiously for restraining trade at home. Such provisions of law, with the rigid enforcement of the anti-trust acts, will guarantee competitive prices in the domestic market.

As regards the danger to the independent American exporter, the specific extension to export trade of the present law prohibiting unfair methods of competition, and the requirement of full reports to the Federal Trade Commission from all co-operative export organizations will furnish an adequate safeguard.

The Commission does not believe that Congress intended by the anti-trust laws to prevent Americans from co-operating in export trade for the purpose of competing effectively with foreigners, where such co-operation does not restrain trade within the United States and where no attempt is made to hinder American competitors from securing their due share of the trade. It is not reasonable to suppose that Congress meant to obstruct the development of foreign commerce by forbidding the use in export trade of methods of organization which do not operate to the prejudice of the American public, are lawful in the countries where the

trade is to be carried on, and are necessary if Americans are to meet competitors there on more nearly equal terms.

By its investigation the Commission established the fact that doubt as to the application of the anti-trust laws to export trade generally prevents concerted action by American business men in export trade, even among producers of non-competing goods. In view of this fact and of the conviction that co-operation should be encouraged in export trade among competitors as well as non-competitors, the Commission respectfully recommends the enactment of declaratory and permissive legislation to remove this doubt. This recommendation is made subject to the condition that the legislation shall be carefully safeguarded and shall make absolutely clear that the combinations for export business are subject to all the rigors of the Sherman Law if they are used to restrain trade in the United States. (Pt. 1, pp. 9-10.)

The recommendations of the Federal Trade Commission were substantially embodied in a bill introduced in Congress by Representative Webb and Senator Pomerene. Its passage was strongly urged by President Wilson, by the Secretary of Commerce, Mr. Redfield, and by numerous commercial and trade organizations.

Commission's Plan Endorsed by President.

In his annual address to Congress on December 5, 1916, President Wilson referred to the Webb-Pomerene Bill as follows:

Three matters of capital importance await the action of the Senate which have already been acted upon by the House of Representatives—the bill which seeks to extend greater freedom of combination to those engaged in promoting the foreign commerce of the country than is now thought by some to be legal under the terms of the laws against monopoly.

I shall not argue at length the desirability of giving a freer hand in the matter of combined and concerted effort to those who shall undertake the essential enterprise of building up our export trade. That enterprise will presently, will immediately, assume, has indeed already assumed, a magnitude unprecedented in our experience. We have not

the necessary instrumentalities for its prosecution; it is deemed to be doubtful whether they could be created upon an adequate scale under our present laws. We should clear away all legal obstacles and create a basis of undoubted law for it which will give freedom without permitting unregulated license. The thing must be done now, because the opportunity is here and may escape us if we hesitate or delay.

Chamber of Commerce Commends and Supports Measure.

A committee of the Chamber of Commerce of the United States as early as 1914 had recommended "that Congress should direct the Federal Trade Commission to investigate and report to Congress at the earliest practicable date on the advisability of amending the Sherman Act to allow a greater degree of co-operation in the conduct and for the protection of the foreign trade." In a referendum vote by its members on April 14, 1914, the recommendation was carried by a vote of 538 to 67.¹ At its annual meeting in 1915 the Chamber unanimously adopted a committee report in which it was urged that the following principles should be embodied in a bill to be submitted to Congress:

1. All combinations entered into or carried on in good faith for the sole purpose of increasing, facilitating or benefiting export trade, including agreements, transactions and acts entered into, performed or carried out in the course of export trade, which do not restrain or monopolize, or tend to restrain or monopolize trade, in the United States, should be lawful.

2. The term "export trade" should be confined to trade or commerce from the United States to any foreign nation and the term "foreign nation" should not include any of the insular possessions of the United States.

3. The Federal Trade Commission should be given the same power with reference to organizations, associations, agreements, transactions or acts entered into, performed or carried out in the course of export trade which it has reason

¹See Hearings before the Committee on the Judiciary, House of Representatives, 64th Congress, 1st session, in H. R. 16707.

to believe restrains or monopolizes or tends to restrain or monopolize trade within the United States as it has under the Federal Trade Commission Act in the matter of unfair methods of competition.

4. That none of the powers conferred upon the Federal Trade Commission in the act entitled "An act to create a Federal Trade Commission," etc., should in any way be abridged in such a bill."

Again at its special war convention at Atlantic City on September 21, 1917, the Chamber adopted a resolution urging Congress to pass the Webb-Pomerene bill "before American export trade is brought face to face with the conditions which will follow the close of the European War."¹

Foreign Trade Council Voices Similar Sentiment.

The National Foreign Trade Council, at its meeting at Washington, D. C., in May, 1914, adopted a resolution in which it urged Congress "to take such action as will facilitate the development of American export trade by removing such disadvantages as may be imposed by our anti-trust laws, to the end that American exporters * * * may be free to utilize all the advantages of co-operative action in coping with combinations of foreign rivals, united to resist American competition, and combinations of foreign buyers equipped to depress the prices of American goods." In a report submitted by the Council at the hearings before the United States Senate Committee on Interstate Commerce on January 5, 1917,² the following reasons were given in favor of the enactment of the Webb-Pomerene Bill, viz.:

1. The doubt, amounting to prohibition, of the right to co-operate enables foreign buyers, playing American producers one against another, to obtain American raw materials cheaper than American buyers, which with the lower European labor cost gives the European merchandise fab-

¹Chamber of Commerce of the U. S. American Export Trade. The Webb-Pomerene Bill a War Measure. September, 1917.

²See Hearings before the Committee on Interstate Commerce, U. S. Senate, 64th Congress, 2nd session on H. R. 17350, p. 36.

ricated therefrom an added advantage in competition with American goods. Inability to co-operate thus confers upon our competitors a practical subsidy.

2. Co-operation in export selling is imperative to meet the proposed post-bellum co-operative buying not only by groups of European industries but even by governments with the object of controlling prices.

3. Co-operation would enable many similar manufacturers and merchants jointly to develop abroad selling power and resources too costly for them to develop individually.

4. Greater stability of export business could be obtained through co-operation and a wider distribution obtained of the benefits of oversea sales as a balance wheel against recurring periods of domestic depression and unemployment.

5. Reduction of "overhead" cost of foreign selling.

6. Increase of normal export trade is essential to defend the gold reserve from sudden drains due to increased European competition.

7. Since the countries with which 95 per cent of American export commerce is conducted have their own anti-trust laws, the application of the American laws to exporters merely subjects them to a double standard and can not reach their competitors.

Influential Trade Organizations Advocate Enactment.

The Merchants' Association of New York, the Chamber of Commerce of the State of New York, the Associated Business Papers, Inc., New York, the American Manufacturers' Export Association, the National Association of Manufacturers of the United States of America and others declared themselves in favor of the Webb-Pomerene Bill and advocated its passage before committees of Congress which held hearings on the bill.

Congress Enacts Webb-Pomerene Law.

After various changes and amendments the Webb-Pomerene Bill (H. R. 2316) was finally passed by a vote of 241 to 29 in the House of Representatives on June 13, 1917, and by a vote of 51 to 11 in the Senate on December 12, 1917. On April 6,

1918, the Senate agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill, and on April 10, 1918, the same was approved and signed by President Wilson. It is entitled "An Act to promote export trade, and for other purposes," Public Act No. 126, 65th Congress. (40 Stat. at L. 516-18.)

PART FOUR

THE WEBB-POMERENE LAW

CHAPTER XI.

Summary of the Webb-Pomerene Law.¹

Analysis of Statute.

According to its title, this law was enacted "to promote export trade and for other purposes." As defined in *Section 1*, "export trade" means commerce carried on exclusively with foreign nations; "trade within the United States," means domestic trade within and between the States and Territories and the District of Columbia; while the word "association" means any corporation or combination, by contract or otherwise, of two or more persons, partnerships or corporations."

Section 2 relieves export trade associations from the rigors of the anti-trust laws in so far as they relate to combinations, provided the associations do not seek to carry on "trade within the United States," as above defined, and also refrain from practices that tend to monopolize domestic commerce.

Section 3 permits one corporation to acquire the whole or any part of the stock of another incorporated body, provided the latter is organized and engaged solely in export trade and there is no restraint or other interference with domestic trade. In order to clear the way for combinations of this description and to make our manufacturers and traders feel at ease when thus engaging in foreign commerce, export trade is expressly exempted from the provisions of *Section 7* of the Clayton Law, prohibiting ownership of stock in competing corporations.

Section 4 extends the powers and duties of the Federal Trade Commission to include the right to suppress unfair methods of competition used in export trade against competitors engaged in export trade, even though such unfair methods are done outside the territorial jurisdiction of the United States.

In conclusion, *Section 5* requires every association now en-

¹See Exhibit No. VI, p. 438.

gaged or hereafter engaging in export trade to file with the Federal Trade Commission a verified written statement of the location of its offices, the names and addresses of its officers, and a copy of the papers showing how it is organized, together with a list of the stockholders or other persons interested in the enterprise. Reports to the Commission must be made as and when required, under penalty of a \$100 per day fine.

Summary Trial of Trade Offenders.

Where an apparent infraction of the Act is shown or charged, the association may be summoned before the Commission; and, in way of promoting a reform in its policy and management, a readjustment of its affairs will be recommended. Disobedience of the Commission's requirements entitle that body to prepare and transmit its findings and recommendations to the Federal Attorney General, for the purpose of consideration thereof prior to instituting proceedings against the association under the provisions of the anti-trust laws. On this point the Act is not mandatory; the Attorney General possesses discretionary powers. Doubtless such prosecutions, when convictions ensue, will carry with them cancellation of the privilege of doing foreign business under the Act, although the statute itself is silent upon that point.

There are a number of provisions of the Act which must be brought before the courts and construed before their exact meaning and scope can be known. Others again may be clarified and applied to specific cases by rulings of the Federal Trade Commission. In the detailed discussion of the various provisions of the Act in Chapters XII, XVII attention is called to a number of problems which surround the practical operation and application of the Act.

Export Trade Act Proceeds Along Original Lines.

The Webb-Pomerene Act is a pioneer in commercial legislation rather than the finished product of legislative thought, for that element is something that only experience can produce.

Export and import trade conditions, and the innumerable factors and elements that surround international trade and commerce are in a constant state of flux. It is not always good policy to lay down hard and fast rules regarding them. What appears sound and correct today, may, as a result of changed economic conditions, prove undesirable or unworkable a year hence. With this in mind, the unique methods provided by Congress for enforcement of the Webb-Pomerene Act appear particularly commendable. We recognize in them a spirit of guidance and helpfulness rather than a repressive attitude toward business, an effort on the part of the government to aid American business men engaged in foreign trade to correct and adjust their machinery in accordance with the standards of good morals.

Foreign Conditions Prompted Enactment.

An examination of the facts which prompted Congress to enact the Webb-Pomerene Law (see page 147), shows that the statute was intended partly as a defensive trade measure. In the words of President Wilson, co-operation in export trade was to make it possible for American exporters "to manage their export business at an advantage instead of a disadvantage as compared with foreign rivals." The combination movement in international trade which challenged attention prior to the passage of the Act, has grown in leaps and bounds since that time (see page 129). Where before the war there was a limited number of export combinations, chiefly in Germany, we now find them in large numbers in all leading countries of the world.

Looking at competitive conditions, then, as they exist in world trade today, the fact cannot be disregarded that organized groups have replaced very largely the individual enterpriser, and that future development apparently tends in the same direction. There is this marked difference, however, that whereas, in the absence of any government control, more or less secrecy enclouds the organization and operation of foreign export combines, American export associations operating under the Webb-Pomerene Act must comply with specific legal regulations. They

are subject to a certain supervision by the Federal Government, and thereby fair competition and high business standards and the public interests are severally and continuously safeguarded.

Trade Standardization Wins Approval Abroad.

It is an outstanding fact that the Webb-Pomerene Law represents the first effort involving compulsory registration of export trade combinations by a government agency under a special law. This fact alone constitutes a noteworthy forward step in the consummation of an American foreign trade policy, the significance and importance of which is being favorably recognized not only among our own people but also in foreign countries. In Canada and in England commercial legislation along similar lines has been initiated and the old traditional policy of *laissez faire* in export trade seems gradually to be giving way to new principles such as are embodied in the Webb-Pomerene Act.

CHAPTER XII.

Section I of the Webb-Pomerene Law.

Export Trade

Meaning of "Export" Judicially Determined.

The correct definition of the word "export" is highly important, in connection with our general subject. Fortunately, we have at our command an authoritative statement by the United States Supreme Court:

"Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and Laws of the United States, generally means the transportation of goods from this to a foreign country." *Swan & Finch Co. v. United States* (190 U. S. 143, 1902).

Obviously enough, however, this definition does not cover the entire subject, which demands the broadest treatment, but here, too, we are fortunate in having a further description of the essential quality of export trade:

"As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to some foreign country or other." (17 Op. Attys. Gen. 583, 1883).

So that by combining these two descriptive terms and making them into one composite whole, we have for our version the authoritative definition of the term as employed in the United States Constitution and Laws; and "export" means the transporting of goods from this to a foreign country, with an intention of there so disposing of them that those specific goods will not return to the United States. It is plainly seen that mere price-fixing, allotting orders, etc., does not come within the definition; physical transmitting of actual goods is required.

Even this definition, however, requires some elucidation—as that export of the goods in question is not effectuated by the intention to (a) store the articles abroad, with the idea of importing them at a later time; and with the implication that the purpose of the transaction is not scientific or otherwise altruistic, but is commercial, i. e., intended to make money; (b) send them upon a voyage for the ripening effect, as upon wine or fruits; or (c) cause the goods to be carried through foreign ports en route from one domestic port to another, as, for example, stopping some time at Buenos Aires in transit from San Francisco to New York; and (d) supply provisions, coal, etc., for consumption upon the voyage or journey. It is quite evident the term “export” does not properly apply to any of these four situations.

The rules of legal construction call for a liberal disposition of the doubtful element in favor of the individual when a burden is placed upon a citizen; but where a *grant of privilege* exists, the benefit of the doubt goes to the grantor, in this case the government. (*Swan & Finch Co.*, supra.) Unquestionably, the merchant or manufacturer engaged in export trade will in most instances have some *duty* to perform; so that having assumed the “burden,” he is entitled to favorable consideration, for the performance of acts in way of duties will not be imposed by means of vague or doubtful interpretations. (See *Powers v. Barney*, 5 Blatch. 202, mentioned in the *Swan & Finch Co.* case, already quoted herein.)

Other Authorities Confirm Judicial Definition.

In confirmation of the description and definition of the term “export” embodied in these authorities, we call attention to the fact of its acceptance and application by the United States Treasury Department, when determining the status under the custom laws, of coal and other stores, laden upon vessels for consumption or use during a voyage to a foreign country. The word “export,” regarded as a noun, is defined in Webster’s International Dictionary as “a commodity conveyed from one country or state to another in way of traffic;” and the Century

Dictionary describes "exportation" as "the act of conveying or sending to a distance, especially to another state or country, commodities in the course of commerce." All of which, in substance, restates and reiterates the position assumed by the Attorney General and the Supreme Court in the opinions set forth by those public functionaries, respectively, in the years 1883 and 1902.

"Export Trade" Means Outgoing Trade.

In a relatively early case, the Supreme Court ruled (*Woodruff v. Parham*, 8 Wall. 123, 132, 1868) that the constitutional provision, "No State shall levy any imposts or duties on imports or exports," did not refer to articles transported from one State to another, but only to articles connected with trade between foreign countries and the United States; and this holding was in the face of a remark by Chief Justice Marshall (*Brown v. Maryland*, 12 Wheaton 449) that the principles involved in the construction of this phase of the Constitution "apply equally to importations from a sister State." Those utterances, however, were so intimately associated with ideas born of colonial associations and methods of thought that we should and do discount them when dealing with current situations; and the sentiments expressed by the same court in the *Swan & Finch Co.* case are the more convincing because they are founded upon a broader view of the plan of government provided for us by the Fathers of the Constitution.

In brief, "export trade" is a term which was employed by the framers of the Webb-Pomerene Law to designate the outgoing commerce of the United States; and no other meaning is admissible when construing and applying that statute.

TRADE AND COMMERCE.

Definition of Terms by Courts.

These terms have been so long and so frequently applied to the affairs of traffic that it is difficult to disassociate or differentiate between them. Obviously there must be a distinction—

otherwise the act of dealing in products would be described in one compact composite term. The distinction is set forth in one of the earlier anti-trust cases, *United States v. Coal Dealers' Assn.*, 85 Fed. 252, 265:

"What, then, is trade and commerce among the several States and with foreign nations? 'Trade,' in a business sense, has been defined as 'the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of exchange.'

"The word 'commerce,' as used in the statute and under the terms of the Constitution, has, however, a broader meaning than the word 'trade.' Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities." Circuit Judge William W. Morrow, sitting as a Circuit Court in the Northern District of California (1898).

The same court, sitting in the District of Massachusetts, per Mr. Circuit Judge William L. Putnam, says in definition of the same words:

"The court does not feel at all embarrassed by the use in the anti-trust act, commonly styled the Sherman Law, of the words 'trade or commerce.'

"The word 'commerce' is undoubtedly in its usual sense a larger word than 'trade,' and sometimes 'trade' is used to embrace as much as 'commerce.' They are, in the judgment of the court, in this statute, synonymous." (*United States v. Patterson*, 55 Fed. 639, 1893.)

The last-named authority illustrates his contention by numerous illustrations, and, *inter alia*, specifies that in an English case (*Regina v. McCully*, 2 Moody, Cr. Cases, 34) the words "ram, ewe, sheep and lamb" were construed as if they read "sheep and lamb," the first two words being rejected as surplusage.

Another Federal Court, when ruling that transportation "in interstate commerce" is equivalent to transportation "from one state to another," has said:

"The word 'commerce' as used in the Constitution has never been given any fixed, definite or circumscribed meaning by the Supreme Court; but it was said in *Gibbons v.*

Ogden, 22 U. S. (9 Wheat.) 189, 6th L. Ed. 23: 'Commerce undoubtedly is traffic; but it is something more—it is intercourse.' ”

In an able decision the Court of Appeals of the State of Georgia says:

“It is very difficult to impose the limitations of a definition upon the word ‘commerce’ as used in the Constitution. How that word, which originally was considered as synonymous in meaning with the word ‘trade’ has been enlarged so as to include contracts, transportation, ways, means and agencies, and even instrumentalities by which commercial intercommunications are carried on, is a matter of legal history.” *Charleston & W. C. Ry. Co. v. Anchors*, 10 Geo. Appeals, 322, 325, 1911.

But the duly authenticated definition by the United States Supreme Court is contained in *County of Mobile v. Kimball*, 102 U. S. 691, 702, 1880 (26 L. Ed. 238, 241):

“Commerce with foreign nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transit of persons and property, as well as the purchase, sale and exchange of commodities.”

Application of Definitions to Wording of Statute.

Having now studied to some extent the very highest authorities as to the construction of American statutes, let us turn our attention to the wording of the Webb-Pomerene Law, and endeavor to extract the true meaning from the portions thereof which relate to the words “trade” or “commerce.”

And here, at the outset, we find confirmation of our belief that the scope of those terms has broadened since the period of the Supreme Court ruling we have cited. The words themselves bear out such a construction, as witness the expressions appearing in the following extract from the Webb-Pomerene Export Trade Act.

“Section : * * * the words ‘export trade’ wherever used in this act mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported

from the United States or any Territory thereof to any foreign nation; but the words 'export trade' shall not be deemed to include the production, manufacture or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares or merchandise, or any act in the course of such production, manufacture or selling for consumption or for resale."

Presumptively, Exporting Does Not Include Manufacture.

It is practically certain, however, our courts will not consent to give those words the broad interpretation necessary to afford export associations the right to manufacture the goods they offer in foreign markets. Edward N. Hurley, chairman of the Federal Trade Commission, testified before the House Committee of the Judiciary, July 18, 1916:

"In submitting this plan for a co-operative selling agency it is particularly provided that it does not include manufacturing for export; it is restricted to selling in export trade." This remark indicates plainly the intent of the officials who framed the law.

The person drafting the law evidently was convinced that "*production, manufacture*" were terms which might be esteemed a natural or even essential ingredient of "trade" of the "export" description; and he negatived the connection by such an express disavowal as would not have been necessary or even pertinent at an early stage in the development of American commercial legislation. Reference to the earlier decisions among those already quoted make that point clear.

The extent of this prohibition, however, turns upon whether the words "for consumption or for resale, within the United States or any Territory thereof" relate to creating goods intended for export, as well as to manufacturing for home consumption. The location of the comma after "resale" seems to indicate the act of manufacturing and not the destination of the goods, as the prohibited thing; and if this is so, export associations are confined to foreign traffic and cannot produce the goods they sell. The language is not clear; and a judicial construction will be required to set this matter at rest.

No Express Grant of Right to Operate Steamships.

Other questions arise, as is natural in the application of a new statute. Thus, the right to operate steamship lines, and to load them on their return voyages with goods obtained by barter or purchase abroad is so important that the profits of the entire venture may depend upon a liberal construction of the privilege the Webb-Pomerene Law confers upon merchants and manufacturers.

No doubt these questions can be met and overcome by segregating the items of export trade and operating strictly within the confines of the export association, until such time as the courts have passed upon the intent and meaning of the terms employed in the statute. The other activities necessary to successful traffic abroad can be carried on under separate corporations or organizations; and if the statute as defined by the courts should hamper business and embarrass trade, Congress can deal with the subject by appropriate amendments, as matters develop. An elastic statute, liberally construed, is preferable to an enactment which purports to provide for every possible contingency.

However, even though the Webb-Pomerene Law defines and hedges about "*export trade*" in a restrictive manner, it must be borne in mind that as a whole the Act is a great step forward in the direction of liberating our foreign trade from the penalties and forfeitures of the Sherman Anti-trust Law. We must also constantly realize that Congress intended to confer rights with all the reasonable incidental powers necessary to make those rights effective and fruitful, for it would be a sheer impossibility to operate an "export association" with no powers outside of those strictly and technically connected with being engaged in export trade. It is a general doctrine and principle of corporation law that a corporation not only possesses the specific powers conferred upon it by its franchise, but is also entitled to exercise those fairly to be implied from its chartered powers, together with all the privileges necessary to carry out and effectuate the object of its existence.

Most Export Associations Presumably Will Incorporate.

While "export associations" are not necessarily corporations or even partnerships, it will be found that the vast majority of the concerns operating under the Webb-Pomerene Export Trade Law will adopt corporate forms as the most convenient and feasible means of doing business; and in any event, the principle of the implication of necessary powers is of such general application that it would seem to include export associations among the aggregate bodies comprised within that well-known and broadly-recognized doctrine of legal construction. Within the list of those implied powers we may fairly include the establishment and maintenance of agencies and the right to operate as agent in foreign trade; the acquirement, equipment and use of wharves, warehouses and various other kinds of real or personal property—subject, of course, to the requirements of the basic Act, and also subject to the laws of the country where the association's foreign business is carried on.

Doctrine of Implied Powers Tends to Broaden Rights.

This enumeration of implied powers is employed merely in way of illustration; many other acts incidental to engaging actively in foreign traffic will make themselves known as our export trade develops its expected force and volume; but we believe we have given such instances as will suffice as measures with which to test each business act as it comes up for consideration. In general, where the particular transaction is useful and necessary, does not transcend the purposes of the Act, and is not monopolistic or trade-controlling in its effect, the export association may proceed along that pathway, upon the theory that the nature of the objective presumably marks the transaction as one within the scope of its implied powers. .

FOLLOWING UP GOODS IN COURSE OF BEING EXPORTED.

Must Shipments Abroad Consummate Export Sales?

The question may arise whether it is lawful for an "association" operating under the Act to sell products of its members

to other export houses located in the United States, to be exported by such buyers. Or in other words, may an "association," instead of selling through agents or representatives abroad or directly to foreign buyers, sell goods through agents or brokers at the seaboard for export purposes?

It is quite conceivable that an export "association" would receive numerous requests from business houses in New York, Philadelphia, Boston, San Francisco, etc., for products manufactured by the members of such "association," with the assurance on the part of the prospective customer that the goods are to be purchased for export only. Offers of this kind may come in large numbers, particularly from export commission houses and brokers whose profits as middlemen would be eliminated by direct sales by "associations" to foreign buyers.

In the absence of a provision in the Act expressly requiring "associations" to sell directly to foreign buyers, it may be assumed that all that is necessary in such cases is that the sales shall be for export. To go a step farther, the "association" might insert in its quotation forms and acknowledgment of orders a clause to the effect that all quotations made on orders are for acceptance, and are made for export only. Furthermore, the "association" might reasonably require the buyer to furnish some form of certificate that the commodities purchased have actually been exported.

Intent of Statute Apparently Precludes Nominal Transfers.

However, under the terms of Section 1, which provides that "the words 'export trade' shall not be deemed to include the * * * selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares or merchandise," there appears to be good reason for assuming that as a regular course of business, sales by "associations" to other export houses in this country are not allowable, even under the supposition or understanding that such sales are for export. An exception might be made, perhaps, in case of emergency, as for instance where goods intended for export miss steamers, or

where credits are not opened properly. In such and similar cases of emergency the "association" might feel justified in selling the goods, when actually purchased by others for export, in order to save itself from loss. The burden of proof that an emergency actually existed would rest on the "association."

But the foregoing distinction between regular and emergency sales will not apply to sales of material by associations to domestic manufacturers who would use them in the process of manufacturing goods for export. As Mr. Bissell has pointed out (see "*The Webb Act: Its Legal Aspects*," page 11), such sales are not "acts in the course of export trade" merely. So far as the seller is concerned, such products or goods are consumed within the United States and come within the express exclusion of selling for consumption in this country.

IMPORTING BY ASSOCIATIONS.

Importing Precluded.

Is it lawful under the Webb-Pomerene Act for export associations to import goods, wares or merchandise? At first glance this question must be answered negatively. Section 1 of the Act clearly authorizes "solely trade or commerce in goods, wares or merchandise *exported, or in the course of being exported* from the United States or any Territory thereof to any foreign nation." Moreover, Section 2 of the Act exempts from the Sherman Anti-trust Act associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade." In Section 5 the filing of certain statements with the Federal Trade Commission is required of associations engaged or which thereafter engage solely in export trade. These provisions of the Act seem to preclude importing absolutely. Furthermore, the debates on the Webb-Pomerene Bill in Congress show conclusively that it was the avowed intention of Congress to "accurately confine the Webb Bill to purely export trade."¹

¹See e. g. Senator Kellogg's statement in the Congressional Record, Dec. 11, 1917, p. 165 fol.

Anti-trust Laws Prevent Import Trade Combinations.

In addition to the fact that the Webb-Pomerene Act limits the activities of export associations to export trade, several sections of the Wilson Tariff Act of August 27, 1894, as amended February 12, 1913, declare illegal, with certain restrictions, every combination engaged in importing into the United States. These anti-trust amendments of the Wilson Tariff Act¹ have not been modified by the Webb-Pomerene Act and consequently are in force today. They provide as follows:

"Sec. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

"Sec. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy, and being the subject thereof mentioned in section seventy-three of this Act, imported into and being within the United States or being in the course of transportation from one State to another, or to or from a Territory or the District of Columbia, shall be forfeited to the United States and

¹Exhibit 2, p. 407.

may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

"Sec. 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

From the foregoing sections of the Wilson Tariff Act it appears, therefore, that an export association operating under the Webb-Pomerene Law would become guilty of a misdemeanor if it were to engage in importing any article from any foreign country into the United States when such combination, conspiracy, trust, agreement or contract is intended to operate in restraint of lawful trade or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter.

Leading Case Under Wilson Tariff Law.

Under the anti-trust provisions of the Wilson Tariff Law of 1894 a petition was filed May 8, 1912, in the United States District Court, Southern District of New York, against Hermann Sielcken and others in connection with the famous Brazilian coffee valorization scheme. The government claimed that by means of certain contracts between the State of Sao Paulo, Brazil, and a syndicate of bankers and others, the disposition of a large quantity of coffee was placed in the hands of a committee, and competition in the importation into and sale of such coffee in the United States was controlled by such committee, whose operations resulted in doubling the retail price of coffee in the American markets. As Section 76 of the Wilson Tariff Act as it then stood, did not give the right of seizure when the property

owned under any contract, declared unlawful, is in course of being imported into the United States, or if it has been imported into, and is held in one of the States of the United States for the purpose of being employed in effectuating such an unlawful combination—the coffee held by Sielcken and others was not subject to seizure by the government. At the instance of the United States Department of Justice, Section 76 of the Wilson Tariff Act was therefore amended by Congress on February 12, 1913. The proceeding in equity brought by the government against Sielcken and others was dismissed in May, 1913, upon the advice of the State Department that representations had been made by the Brazilian Government that the entire quantity of coffee which was being withheld from the market had been sold to a large number of dealers throughout the United States.¹

It will be noted that the provisions of the Wilson Tariff Act make it unlawful for combinations of importers to increase domestic prices, while the Webb-Pomerene Act forbids intentional and artificial enhancing of domestic prices. On the other hand, we must not lose sight of the fact that the Wilson Tariff Act apparently does not inhibit absolutely all import trade by "combination, conspiracy, trust, agreement or contract," but only such cases which involve intent to restrain trade or to increase domestic prices.

Panama Canal Act Contains Anti-trust Clause.

Another law which contains a provision that may be applied to combinations engaged in importing is the Panama Canal Act of 1912. Under Section 4 of that Act "no vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to pass through said canal if such ship is owned, chartered, operated or controlled by any person or company which is doing business in violation of the provisions" of the Sherman Anti-trust Act and of Sections 73 to 77 of the Wilson Tariff Act of 1894 or of any other supplementary acts

¹See Annual Report of the Attorney General of the U. S., 1912, p. 19 fol., p. 10; also Sen. Doc. No. 36, 63rd Congress, 1st session. "Valorization of Coffee."

to those laws. The different kinds of traffic passing through the Panama Canal are foreign traffic, coastwise and export and import traffic, but nothing in the above quoted section indicates whether anti-trust laws shall apply to all three kinds of traffic or to any part of them.

Does Intent to Re-export Broaden Association's Rights?

Among the problems that have come up in connection with the question of whether or not export associations may engage in import trade under the Webb-Pomerene Act is the following: Is it lawful for export associations to import materials solely for use by its members and exclusively for the production of articles for export? Although the importation of such materials is not prohibited in so many words, nevertheless the law expressly states that the term "export trade" shall not include production and manufacture of goods, wares and merchandise for export. It follows that if production and manufacture for export is prohibited, the antecedent, importation of materials for use in connection with such production and manufacture, must also be prohibited.¹

During the debates on the bill in Congress this subject was discussed as follows:²

"Mr. Cline: Does the bill also provide that these same combinations may establish a purchasing agency for purchasing raw materials in those same foreign markets?

Mr. Webb: No, but it is assumed that they can buy in America what they sell in foreign countries.

Mr. Cline: But they could not establish a joint agency for the purchasing of raw materials abroad?

Mr. Webb: The bill does not provide that. It is confined to 'export,' and 'export' can not mean 'import.' * * * This agency could not engage in import business, and hence could not buy for this purpose." * * * An association formed under this bill can only engage in export trade, and hence would not be permitted to buy raw ma-

¹See L. H. Bissell. "The Webb Act: Its Legal Aspects," New York, 1919, p. 9 fol.

²Congressional Record, Aug. 31, 1916, p. 15811 fol.

terial in foreign countries or any other material for 'import' into the United States. Some think we should allow the buying agencies for import trade, but this bill does not permit such, but only agencies or associations to engage solely in export trade."

The problem assumes a somewhat different aspect if an export association were to import, not as a permanent practice, but as a matter of temporary necessity, certain commodities which it had taken in forced payment for commodities exported. Export associations handling soaps, oils, etc., for example, may have thrust upon them as payment for their export products, copra or other raw materials. Then too, the universal disturbance of exchange rates and credit conditions may produce situations where American exporters may be forced to accept goods instead of cash money for their exports. Besides, conditions may exist in the respective foreign countries which would make it impossible to dispose of such goods abroad at a fair price. The only alternative remaining would be to bring back such exchange or barter goods in place of cash payment. In justification of this, it has been contended that export trade includes payment and the use of the proceeds in this country, even though such proceeds by reason of extraordinary circumstances consist in imported commodities. However, in view of the clear-cut restriction of associations under the Act to export trade solely, uncertainty remains as to whether any importing at all is permissible under the present terms.

FOREIGN MEMBERS OF EXPORT ASSOCIATIONS.

Extent of Membership in Export Associations.

May foreign individuals, partnerships or corporations become members of an export association? It can readily be seen that considerable advantage would come to an association operating under the Webb Law, if it could include in its membership one or more competing foreign concerns operating either within the United States or abroad. It is questionable, however, whether this would be lawful under the Webb-Pomerene Act. The title

of that Act is as follows: "An act to promote export trade, and for other purposes." In Section 1 the term "export trade" wherever used in the Act, is defined to mean "solely export trade or commerce in goods, wares or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation." This makes it clear that the export trade which the Act contemplates to promote is export trade from the United States or any Territory thereof to any foreign nation. Export trade, therefore, is absolutely restricted to goods going out of this country.¹

Obviously a foreign member concern of an export association, whose manufacturing plant is located outside of the United States, could not ship its goods out of this country, unless such goods were first imported into this country. But associations apparently under the Act are not allowed to engage in import trade (see page 170), so that a foreign concern located in a foreign country, whose export trade does not issue from the United States could not, apparently, become a member of an export association under the Act.

The situation would be somewhat different if the plant of the foreign member concern were located within the United States. The shipment of its products to a foreign country would apparently be export trade from the United States. In the latter case, however, the question would arise whether the fact that said corporation is incorporated in a foreign country and is therefore a foreign corporation, would prevent it from becoming a member of an export association operating under the Webb-Pomerene Act.

Debates in Congress Illuminate Situation.

The debates on the bill in the House of Representatives shed some light on this proposition.² Representative Dillon in the course of the debate offered as an amendment to Section 5 of

¹See Congressional Record, Aug. 31, 1916, p. 15812, statement by Representatives Hill and Webb.

²Congressional Record, Sept. 2, 1916, p. 16011 fol.

the bill that after the word "trade" the following words be inserted, viz., "associations formed under the terms of this act shall be solely of citizens or corporations of some State of the United States." The following discussion ensued:

"Mr. Stafford: Does the gentleman mean to exclude from the purpose of this act a selling corporation, for instance, in Buenos Aires, composed of five-sixths citizens of the United States and perhaps one citizen of Argentina? Can not the gentleman comprehend a situation of that kind where there was a selling agency with some foreigner a member of the association at the local situs?

Mr. Bennet: The law of the foreign country might declare that one director should be a citizen of that country.

Mr. Dillon: My thought was that these corporations ought to be composed of our own citizens or corporations. We ought not to go into a foreign country to get our incorporations to engage in our export business.

Mr. Gard: I think we are all in sympathy with what the gentleman wants. His idea is that this legislation shall be for the benefit of American exporters * * *. There is no better way of learning (foreign customs) than to be associated with people of the country. The gentleman's amendment would have the effect—it would say that no association having for instance one person in it a native of Buenos Aires, or of some other South American country, could come within the provisions of this act. It would go so far as to say that anybody who held stock in a corporation, one or two shares of which were held by a citizen of a South American country, could not operate under the provisions of this act. I think that is certainly what the gentleman does not desire to do, at least it is not what he should want to do.

Mr. Bennett: Would it be possible to agree on an amendment limiting the privileges of this bill to such corporations as had at least 60 per cent of American ownership?

Mr. Gard: I think the gentleman can see that we can not go nearly to the length advocated by the gentleman from South Dakota (Mr. Dillon) * * *. I hope it (the amendment) will not prevail."

Thereupon the amendment was rejected. It is quite plain therefore that the intent of Congress was not to restrict membership in export associations under the Act to American citizens or corporations.

Summary of Benefits Conferred.

To recapitulate, the purpose of the Act, as indicated by its title and explained in Section 1 is to promote export trade from the United States. The whole history of the Act shows that American exporters are to benefit under it. It was not, however, the intent of Congress to exclude foreign individuals or corporations from membership in export associations operating under the Act, in so far as the inclusion of such foreign members would be advantageous and helpful in promoting American export trade and provided, of course, that such co-operation with foreigners be not in restraint of the domestic or export trade of any domestic competitor of such association and that by such agreement prices within the United States are not artificially or intentionally enhanced or depressed.

ASSEMBLING PLANTS OPERATED IN FOREIGN COUNTRIES.

Is it lawful under the Webb-Pomerene Act for export associations to maintain and operate assembling plants in foreign countries? Numerous American manufacturers export their manufactures unassembled or "knocked down," and assemble or finish them in shops and assembling plants which they have established in foreign countries for this purpose. This is the case, for example, with agricultural implements, locomotives and machinery generally. Under the tariff laws and regulations of several foreign countries agricultural machinery, if set up or assembled, is subject to import duties which are almost prohibitive. It is more expedient for American manufacturers therefore to export the unassembled parts and to take advantage of the lower import duties abroad on such parts. Besides, in many cases facilities available for oversea shipments necessitate the shipment of goods in unassembled form.

During the hearings on the Webb-Pomerene Bill in its original form this subject was brought to the attention of the Senate Committee on Interstate Commerce.¹ It was pointed out that

¹See Hearings before the Committee on Interstate Commerce, United States Senate, *op. cit.*, p. 29.

the wording of Section 1 of the bill in its original form, which provided that "export trade * * * shall not be deemed to include the production or manufacture of such goods, wares or merchandise, or any act in the course of production or manufacture," would exclude the operation of assembling plants in foreign countries. To take care of this situation, it was suggested that the last clause of the first paragraph of the bill be changed to read "but the words 'export trade' shall not be deemed to include the production or manufacture *within the United States or any Territory thereof* of such goods, wares or merchandise, or any act in the course of such production or manufacture." Subsequently the original wording of the bill objected to was so changed. It thus appears that it was the intent of the Senate Committee on Interstate Commerce and of Congress to allow export associations operating under the Webb-Pomerene Act to operate assembling plants in foreign countries. Moreover, it seems reasonable to assume that the practice of exporting unassembled parts of an article and setting up the complete article abroad is a legitimate incident to the export transaction.

DOMESTIC MANUFACTURING BY EXPORT ASSOCIATIONS.

Is manufacture, exclusively for export by export associations, within the United States, prohibited by the Webb-Pomerene Act? It has been contended that export associations might, in accordance with Section 1 of the Act, engage in manufacturing. A proper solution of this question hinges on the interpretation of the following sentence contained in Section 1:

"But the words 'export trade' shall not be deemed to include the production, manufacture or selling for consumption or for resale, within the United States, etc."

As these words stand and according to their punctuation, the natural grammatical meaning of the context is that production and manufacture are not included in the term "export trade," and that therefore export associations shall not engage therein. However, a broader interpretation has been suggested, according

to which the words "for consumption or for resale, within the United States," etc., modify not only the word "selling" but also the preceding words "production" and "manufacture." The meaning thus would be that the words "export trade" shall not be taken to include (1) the production for consumption or for resale within the United States, (2) the manufacture for consumption or for resale within the United States. In other words, under Section 1 not manufacture would be prohibited but manufacture for consumption or for resale within the United States, and it would thus be lawful, if this construction is correct, for export associations to engage in production and manufacture for export.

The foregoing construction is, however, forced and artificial and contrary to the natural and primary meaning of the context. Moreover, it is not the construction placed upon the wording of Section 1 by Representative Webb and by Senator Pomerene, the authors of the bill, and by other participants in the debates on the bill in Congress. In answer to a question by Mr. Cannon as to whether export associations under the terms of the bill could manufacture, Mr. Webb answered with a categorical "no." In further explication Mr. Webb said:

"It [the association] is not intended to be a manufacturing association. A manufacturing association can not form one of these organizations, because the language is this: 'But the words "export trade" shall not be deemed to include the production, manufacture or selling for consumption within the United States or any Territory thereof.'¹

"The bill is confined to export business, and such selling agency can not be a producing corporation, only a buying and selling agency in export trade. The selling agency could not manufacture the raw materials [purchased by it abroad] because the bill forbids such agencies or corporations to produce anything."²

In the Senate debates on the bill, Senator Pomerene in discussing this point said in answer to Senator Cummins:

¹Congressional Record, June 13, 1917, p. 3840 fol.

²Congressional Record, Aug. 31, 1916, p. 15811.

"By the very terms of the bill it is expressly provided that the production and manufacture of these goods shall not be regarded as a part of the export trade."¹

It is thus quite clear that the framers of the bill intended not to allow export associations to engage in manufacture or production and deliberately worded Section I to this effect.

TERRITORIES.

Jurisdictional Scope of Export Trade Law.

One of the most important practical problems² that has developed since³ the Webb-Pomerene Law has been in operation

"centers around the question of whether or not it is lawful under the Webb-Pomerene Law for an export association to ship goods to the Philippine Islands, Porto Rico and Hawaii. It has been contended that from the practical business man's point of view trade with the Philippines is looked upon as export trade, since it involves overseas shipment, special packing, bills of lading, marine insurance, foreign landing arrangements, etc.

"Business with the Philippines, it is alleged, requires a knowledge of the Philippine tariff and the carrying on of correspondence in a foreign language.

"Ordinarily, all matters of that kind relating to export shipments are handled through the central sales organization of export associations. In view of the fact, however, that certain associations have been advised by their counsel that business with the Philippines might be considered as domestic trade under the Webb-Pomerene Law, such business is handled separately from the export business. Such segregation means a duplication of office staff and extra expense. Thus far five associations have expressed a desire for clarification of this matter, and all seem to agree that from the technical business viewpoint trade with the Philippines should be considered export trade under the terms of the Webb-Pomerene Act."

¹Congressional Record, Sept. 23, 1917, p. 8032.

²Address by Commissioner Huston Thompson, on "Webb Law Developments," (before the Seventh National Foreign Trade Convention at San Francisco, May 14, 1920).

³See recommendations of U. S. Chamber of Commerce in Hearings before the Committee on the Judiciary, H. of R., 64th Congress, 4th Session on H. R. 16707, p. 64.

The question as to whether or not it is lawful for Webb Law associations to ship goods to the Philippine Islands, Porto Rico and Hawaii depends upon the meaning of the terms "export trade" and "Territory" in Section 1 of the law. We have discussed the term "export trade" in general above (page 161), but we shall now consider it with special reference to the Territories of the United States.

"EXPORT TRADE."

Meaning of Term Adduced from Court Decisions.

The Webb-Pomerene Law, "An Act to promote *export* trade, and for other purposes," provides in Section 1:

"That the words 'export trade' wherever used in this Act mean solely trade or commerce in goods, wares or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words 'export trade' shall not be deemed to include the production, manufacture or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares or merchandise, or any act in the course of such production, manufacture or selling for consumption or for resale.

"That the words 'trade within the United States' wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States."

"Export trade" is defined in this section as meaning "solely trade or commerce in goods * * * *exported*, or in the course of being exported *from the United States or any Territory thereof* TO ANY FOREIGN NATION."

"Export" has repeatedly been held by the Supreme Court of the United States to mean exportation of goods from the territory belonging to the United States *to a foreign nation*. In

Dooley v. United States, 183 U. S. 151, 154 (Dec. 2, 1901), the court held:

"It follows, and is the logical sequence of the case of *Woodruff v. Parham*, that the word 'export' should be given a correlative meaning, and applied only to goods exported to a foreign country. If, then, Porto Rico be no longer a foreign country under the Dingley Act, as was held by a majority of this Court in *De Lima v. Bidwell*, 182 U. S. 1, and *Dooley v. U. S.*, 182 U. S. 222, we find it impossible to say that goods carried from New York to Porto Rico can be construed as 'exported' from New York within the meaning of that clause of the Constitution."

In *Faber v. United States*, 221 U. S. 649 (May 29, 1911), which case involves the question as to whether the Philippine Islands are a foreign country within the meaning of a Treaty between the United States and Cuba, the court held:

"It must be presumed that the words 'other country' in the Cuban Treaty were used according to their known and established interpretation, *ibid*, and did not refer to charges on shipments from territory belonging to the United States. That they were so regarded appears from the language of the Act of March 8, 1902, 32 Stat. c. 140, which studiously avoids using the word 'imports,' and enacts that upon articles 'coming into the United States from the Philippine Archipelago,' there shall be levied only 75% of the rates of duty imposed on like articles imported from foreign countries.

"The 8th Article refers to 'imports'—the correlative of 'exports.' This necessarily related to shipments from a country which was foreign to the United States. *Pittsburg Coal Co. v. Louisiana*, 156 U. S. 590, 600; *Palapasco Co. v. North Carolina*, 171 U. S. 345, 353. The provision that the rates granted to Cuba shall continue 'preferential in respect to all like imports from other countries,' does not relate to charges on shipments between places under the same flag, but to duties laid on shipments—on imports—from countries which are foreign to the United States. Both in the light of our own legislation and in view of the generally accepted interpretation of the word 'imports' the 8th Article of the Treaty cannot be construed to have intended to give Cuba any advantage over shipments of merchandise coming into the United States from a part of

its own territory, where the collections were in part made as a means for raising revenue for the support of the government of the Philippine Islands. Cuba was given a preferential of 20% over tariff rates on imports from countries which are foreign to the United States."

In *Swan and Finch Co. v. United States*, 190 U. S. 143, the court says :¹

"Whatever primary meaning be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country * * *. Another country or state as the intended designation of the goods is essential to the idea of exportation."

Returning to the definition of "export trade" in the first clause of Section 1 of the Webb-Pomerene Law, it would seem quite clear that the Webb-Pomerene Law does not digress from the line of thought in all the decisions cited above in defining "export trade" to mean "trade in goods exported to a foreign nation."

Therefore, as far as the first clause of Section 1 is concerned, trade from the United States to any foreign nation is "export trade" within the meaning of the Webb-Pomerene Law, but trade from one part of the United States to any other part of the United States does not come within the definition of "export trade."

Other Provisions Confirm Belief in Such Construction.

Let us now turn to the second clause of the first Section of the Webb-Pomerene Law, which provides :

"But the words '*export trade*' shall *not* be deemed to include the *production, manufacture or selling for consumption or for resale, within the United States or any Territory* thereof, of such goods, wares or merchandise, or any act in the course of such production, manufacture or selling for consumption or for resale."

¹See also the following cases: *Woodruff v. Parham*, 8 Wall. 123, 136 (1868); *Brown v. Houston*, 114 U. S. 622, 628 (1885); *Turpin v. Burgess*, 117 U. S. 504; *Thompson v. U. S.*, 142 U. S. 471; *Fairbank v. U. S.*, 181 U. S. 283, 294 (1901); *De Lima v. Bidwell*, 182 U. S. 1 (1901).

The first clause provides what "export trade" is, and this second clause what "export trade shall not include." The term "export trade" shall not include production, etc., within the United States or any Territory thereof.

It has been claimed that this second clause of Section 1, limits the first clause, and that, therefore, "production, manufacture or selling for consumption or for resale, etc.," in any place not within one of the several *States* or *Territories* of the United States is trade outside of the United States and is "export trade" under the Webb-Pomerene Law.

But a careful analysis of the second clause would readily show that this deduction is illogical. The second clause states that "production," etc., "within the United States or any Territory thereof," etc., *shall not be* deemed to be *export trade*, *not* that ALL TRADE EXCEPT such production, etc., SHALL BE DEEMED TO BE EXPORT TRADE. It simply states that the particular activities mentioned in this clause are not export trade, *NOT that ALL OTHER TRADE not included in these terms IS EXPORT TRADE*. And the definition in Clause 1 that "export trade" is "trade in goods exported to a foreign nation," is not changed by this second clause.

' "Trade Within the United States."

Now let us consider the second paragraph of Section 1, which provides:

"That the words 'trade within the United States' wherever used in this act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States."

According to this paragraph "trade within the United States" is "trade among the several States or in any Territory of the United States, etc."

Two Definitions in Section 1.

We have two definitions in Section 1: "*Export trade* is trade in goods, etc., exported to a foreign country," and "*trade within the United States*" is "trade among the several States or in any Territory of the United States, etc." Any trade which does not come within either of these definitions is left out of the provisions of the law altogether, and we are not justified in taking it upon ourselves to read such trade into the law as either export or domestic trade.

Should there be any question as to whether a Webb Law association may *export to* a particular place, it is necessary to ascertain whether that place is a foreign country. If it is a foreign country such association may export to it; if it is not a foreign country such association may not export to it.

Should there be any question as to whether a Webb Law association *may be formed* in a particular place, it is necessary to ascertain whether that particular place is a State or Territory of the United States, or the District of Columbia. If it is a State or Territory of the United States, or the District of Columbia, an association may be formed there; if it is not a State or Territory of the United States, or the District of Columbia, an association may not be formed there.

Any place which is neither a foreign country, nor a State or Territory of the United States, or the District of Columbia, is not covered by the Webb-Pomerene Law at all.

The Solicitor of the Department of Commerce, in a ruling published in the Commerce Reports, August 30, 1918, as to whether the Webb-Pomerene Law applied to associations engaged in trade between our mainland and our overseas possessions said:

"Replying specifically to the question raised, I have the honor to advise that in my opinion the Act of April 10, 1918, *supra*, does not apply to associations whose business may be confined to within the United States and its territorial possessions, such as the Philippines, Porto Rico, Hawaii and Alaska."

This ruling is in agreement with what we have said above, that no Webb Law association may export goods to any part of the United States, since no part of the United States is a "foreign country."

"TERRITORY."

Comprehensiveness of Word "Territory."

There has been much discussion as to what the term "Territory" in the Webb-Pomerene Law includes. "Territory" has been defined in *Ex Parte Morgan*, 20 Fed. 298 (Oct., 1883), as follows:

"A territory, under the Constitution and Laws of the United States, is a inchoate state—a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress, with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States."

The Supreme Court of the United States has defined "Territory" in *In re Lane*, 135 U. S. 443 (Apr. 28, 1890):

"But we think the words 'except territories' have reference exclusively to that system of organized government, long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by Act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States."

Aside from these two decisions, we find many cases (discussed below) which distinguish between "organized territories" and "unorganized territories," "incorporated territories" and "unincorporated territories." But in *Peck S. S. Co. v. N. Y. & P. R. S. S. Co.*, 2 P. R. Fed. 109 (Sept. 4, 1906), involving the question as to whether the Sherman Anti-trust Act is in force in Porto Rico, the court said:

"So it appears from every authority that can be cited, that Porto Rico is substantially a territory of the United States, over which all of the general laws of Congress properly applicable to territories, and not in terms locally inapplicable, are in full force and effect.

"To our mind, for the purposes of this particular decision, it is not important whether, as a matter of fact or law, Porto Rico is entirely within the definition of an 'organized territory.' Whether it is sufficiently a territory to come within the terms of Sec. 3 of the anti-trust act aforesaid, which denounces certain acts 'in restraint of trade or commerce in any territory of the United States,' etc., is what is to be decided here."

It was decided that the Sherman Anti-trust Act was in force in Porto Rico.

Construction in Anti-trust Cases is Controlling Here.

The Webb-Pomerene Law is an amendment to the Sherman Law and uses the same term "Territory." So it would appear that any possession of the United States which is a "Territory," whether organized or unorganized, incorporated or unincorporated, is included within the terms of the Webb-Pomerene Law.

LOCALITIES SPECIFICALLY CONSIDERED.

Since the question has been raised as to whether the Webb-Pomerene Law applies to Cuba and the Isle of Pines, Hawaii, Porto Rico, the Philippine Islands and various other possessions of the United States, it might be well to consider each of these places separately.

Cuba and the Isle of Pines

The Republic of Cuba, including the Isle of Pines, is not a part of the United States, but is a "foreign nation."¹ Therefore,

¹Treaty of May 22, 1903, ratified July 1, 1904 (31 Stat. 898); For. Rel. 1904, p. 243. *Neely v. Henkel*, 180 U. S. 109, 119 (Jan. 24, 1901). *Pearcy v. Stranahan*, 205 U. S. 257 (Apr. 8, 1907).

export associations may export goods from the United States to Cuba and the Isle of Pines.

Hawaii and Alaska

Hawaii is a territory of the United States, beyond a question. By Act of Congress of April 30, 1900, ch. 339 (31 Stat. 141), it was formally incorporated into the United States under the name of "Territory of Hawaii."¹

Alaska is also an incorporated territory of the United States,² and is now organized under Act of Congress of August 24, 1912, ch. 387 (37 Stat. 512). Therefore, associations may not ship goods to Alaska or Hawaii, but Webb Law associations may be formed in these territories.

Porto Rico

Porto Rican "Insular Cases."

The *Insular Cases*, decided on May 27, 1901, have been cited as authority for the contention that Porto Rico is not a "territory" of the United States. Let us examine the Porto Rican "*Insular Cases*."

In *De Lima v. Bidwell*, 182 U. S. 1, it was held that Porto Rico, in the autumn of 1899, after its cession to the United States by Treaty with Spain, April 11, 1899, though it had not been formally embraced by Congress within the customs union of the states, was no longer "foreign country," within the Dingley Tariff Act of July 24, 1897, (30 Stat. 151, ch. 11), providing for duties on articles "imported from foreign countries."

Goetze v. United States, 182 U. S. 221, followed *De Lima v. Bidwell*.

¹*Hawaii v. Mankichi*, 190 U. S. 197 (June 1, 1903). See also: *Kawanakoa v. Polyblank*, 205 U. S. 349 (Apr. 8, 1907); *People of P. R. v. Rosaly y Castillo*, 227 U. S. 270 (Feb. 24, 1913).

²*Binns v. U. S.*, 194 U. S. 486 (May 31, 1904). See also: *Steamer Coquitlam v. U. S.*, 163 U. S. 346, 352 (1895); *U. S. v. Pac. & A. Ry. & Nav. Co.*, 4 Alaska 518; *Rasmussen v. U. S.*, 197 U. S. 521; *Interstate Comm. v. Humboldt S. S. Co.*, 224 U. S. 474 (1911).

In *Dooley v. United States*, 182 U. S. 222, it was held that duties could be legally exacted on goods coming into the United States from Porto Rico "under the war power," but that this power ceased with the ratification of peace.

In *Downes v. Bidwell*,¹ 182 U. S. 244, it was held that the imposition of duties upon goods coming into New York from Porto Rico under Act of Congress known as the "Foraker Act" (Apr. 12, 1900, 31 Stat. 77, ch. 191) was a constitutional exercise of the power of Congress, because Porto Rico was not a part of the "United States" within the meaning of the revenue clause of the Constitution (Art. 1, Sec. 8), providing that all duties, imposts and excises shall be uniform throughout the *United States* (United States here meaning the individual *States* of the Union, as distinguished from the *Territories*), and that Congress had authority, under its power to govern the *Territories* (Constitution, Art. IV, Sec. 3) to enact a different tariff (in this case 10% of the duty to be levied upon goods imported from foreign countries) for goods coming into the United States from Porto Rico. In this case five of the nine judges agreed that Porto Rico was not a part of the "United States" (meaning the union of the individual *States*, and not including the *territories*) for all purposes.

Downes v. Bidwell does not hold that Porto Rico is a foreign country, but that it is a *territory* of the United States, for which Congress has power to legislate; that because Congress has not *incorporated* the territory of Porto Rico into the United States for all purposes, it is within the powers of Congress (still under its power to legislate for the territories) to enact laws for Porto Rico which are different from those in force in the rest of the United States (including the states of the union, and the incorporated territories).

It has been said that Congress has treated Porto Rico as a foreign country in tariff matters, but this is not the case. It has simply enacted a different tariff for the territory of Porto Rico than for the rest of the United States (the states of the union, and the incorporated territories).

¹See below, *Dorr v. U. S.*, p. 194. See also above, *Doley v. U. S.*, p. 183.

To sum up the Porto Rican "*Insular Cases*," then, the Supreme Court of the United States has held that Porto Rico is not a foreign country,¹ and, in *Downes v. Bidwell*, that Congress has power to legislate for Porto Rico under its power to legislate for the *territories* of the United States, but these cases do not hold that Porto Rico is not a territory.

Later Cases Confirm Territorial Status.

But the *Insular Cases* have been followed by other cases which make it even more certain that Porto Rico is a "territory" of the United States. *Kopel v. Bingham*,² 211 U. S. 469 (1909), involved the provision in Sec. 5278 of the Revised Statutes that it shall be the duty of the executive power of any state or territory to which a fugitive from justice has fled to cause the fugitive to be arrested, etc., upon demand of the executive authority of the state or territory whence he has fled. Kopel fled to New York after embezzling in Porto Rico, and was arrested in New York under a warrant issued by the governor of the State of New York upon the demand of the government of Porto Rico. Kopel claimed that Porto Rico was not a "territory" as the word is used in Sec. 5278 R. S. Chief Justice Fuller, basing his opinion on the definitions of "territory" in *Ex Parte Morgan*³ and *In re Lane*,⁴ held that:

"It may be justly asserted that *Porto Rico is a completely organized Territory*, although not a Territory incorporated into the United States, and that there is no reason why Porto Rico should not be held to be such a Territory as is comprised in Sec. 5278."

In *America R. R. Co. of Porto Rico v. Didricksen*, 227 U.

¹See also *Huus v. N. Y. & P. R. S. S. Co.*, 182 U. S. 392, and *Gonzalez v. Williams*, 192 U. S. 1.

²This case has been cited as authority by the Supreme Court of the United States in *Am. R. R. Co. of P. R. v. Didricksen*, 227 U. S. 145 (Jan. 1913) and *People of P. R. v. Rosaly y Castillo*, 227 U. S. 270 (Feb. 24, 1913) and by the Federal Court in Porto Rico in *Peck S. S. Line v. N. Y. & P. R. S. S. Co.* and the *Am. R. R. Co. of P. R.*, 2 P. R. Fed. 109 (Sept. 4, 1906), and *Elkins v. P. R.*, 5 P. R. Fed. 103 (Sept. 7, 1909).

³See above, p. 187.

⁴See above, p. 188.

S. 145 (January, 1913), it was held that the Safety Appliance Act,¹ 32 Stat. 943 (Mar. 2, 1903), which provides that Safety Appliance Acts "shall apply to common carriers by railroads in the *territories* and the District of Columbia," is in force in Porto Rico under the Foraker Act of April 12, 1900, which provides that all laws of the United States not locally inapplicable shall apply to Porto Rico. It was held that Porto Rico's organization was in most essentials that of a territory.

The Supreme Court of the United States again held in *People of Porto Rico v. Rosaly y Castillo*, 227 U. S. 270 (Feb. 24, 1913), a case involving suit against the government of Porto Rico, that Porto Rico was a territory and could not be sued.

It has been claimed that the Circuit Court of Appeals held in *People of P. R. v. Am. R. R. Co. of P. R.*, 254 Fed. 369 (Dec. 4, 1918) that the Interstate Commerce Act did not apply to Porto Rico. But what the Court decided in that case was that Porto Rican law applies in case of *local* tariffs of the *intra-island* railroads of Porto Rico, and not the Interstate Commerce Commission Act. This would be true in any state of the United States. This case is easily distinguishable from *Benedicto v. West India & Pan. Tel. Co.*, 256 Fed. 417, 420 (Mar. 19, 1919), in which it was held that *cable* rates in Porto Rico were subject to the power of the Federal Interstate Commerce Commission and not within the jurisdiction of Porto Rican law any more than they would be within the jurisdiction of any state law.

In *Peck S. S. Co. v. N. Y. & P. R. S. S. Co.*, discussed above (page 188), it was decided that the Sherman Anti-trust Act was in force in Porto Rico.² Again in *Pedro Pastor v. N. Y. & P. R. S. S. Co.*, 3 P. R. Fed. 95 (June 1, 1907), it was held that the Sherman Anti-trust Act was applicable to Porto Rico

¹In *Am. R. R. Co. v. Birch*, 224 U. S. 547 (May 13, 1912), the Employers' Liability Act was held to be in force in Porto Rico, but that act is in force in all possessions of the United States, so the question as to whether Porto Rico is a territory was not at issue.

²Cited as authority in *Elkins v. P. R.*, 5 P. R. Fed. 103 (Sept. 7, 1909).

and could be enforced by the District Court of the United States for Porto Rico.¹

In *Elkins v. Porto Rico*, 5 P. R. Fed. 103 (Sept. 7, 1909), a suit against Porto Rico, it was claimed by the government that a territory could not be sued, but was sovereign. The government was upheld. The court said that Porto Rico was to all intents and purposes a territory of the United States, although "not a territory incorporated into the United States."²

In 23 Op. Atty. Genl. 637,³ involving a question of what is meant by "domiciled in the United States" under the trade-mark act, it was said that Porto Rico is an organized territory of the United States and that the people of Porto Rico are entitled to register trade-marks in the United States.

Porto Rico a "Territory" Within Meaning of Webb Law.

In the many decisions of the Supreme Court of the United States, and other federal courts, including the Porto Rican Federal Court, etc., Porto Rico has been held to be "unincorporated territory," "a completely organized territory" and "sufficiently a territory to come within the terms of Sec. 3 of the anti-trust act." In no case has it been held that it is not a "territory." Since the Webb-Pomerene Law uses the term "territory," as does the Sherman Anti-trust Act, to which the Webb-Pomerene Law is an amendment, and the Sherman Anti-trust Act has been held by the Porto Rican Federal Court to apply to Porto Rico, it would seem that Porto Rico is sufficiently a "territory" to come within the terms of the Webb-Pomerene Law, and that export associations may be formed in Porto Rico to export goods to foreign countries. But export associations may not ship goods to Porto Rico, since Porto Rico is not a foreign country.

¹Upholding *Peck S. S. Line v. N. Y. & P. R. S. S. Co.*, 2 P. R. Fed. 109 (1906).

²The court cites *Peck S. S. Line v. N. Y. & P. R. S. S. Co.*, op. cit., and *Kovel v. Bingham* (see page 191) as authority.

³Also discussed on p. 195.

Philippine Islands

Philippine "Insular Case."

In the one Philippine *Insular Case*, *Fourteen Diamond Rings v. United States*, 183 U. S. 176 (Dec., 1901), the Supreme Court of the United States held that the Philippine Islands were not a foreign nations,¹ and the court designates the Philippine Islands as "territory of the United States."²

Philippine Islands are "Territory" of the United States.

In *Dorr v. U. S.*, 195 U. S. 138 (May 31, 1904), a case involving trial by jury in the Philippine Islands, Mr. Justice Day in his opinion held:

"Limitations which are to be applied to any given case involving territorial government may depend upon the relation' of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the Justices agreeing in the judgment in *Downes v. Bidwell*. Until Congress shall see fit to incorporate territory, ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such *territories* and subject to such constitutional restrictions upon the powers of that body as are applicable to the Constitution.

Mr. Justice Day includes the Philippine Islands in the term "territories," but holds that they are not an "*incorporated territory*" to which all the laws of the United States not locally inapplicable shall apply.

¹See also *Faber v. U. S.*, 221 U. S. 649 (May 29, 1911).

²See also *Lincoln v. U. S.*, 197 U. S. 419 (1904); *Kepner v. U. S.*, 195 U. S. 100 (1904); *Mendezona v. U. S.*, 195 U. S. 158 (1904); *Faber v. U. S.*, 221 U. S. 649 (1911); *U. S. v. United Cigar Stores Co.*, 1 Crt. Cust. App. 450 (April 10, 1911).

In the opinions of the Attorney General of the United States, 23 Op. Atty. Gen. 635, it is said that the Philippine Islands are not "completely organized territories," within the provisions of the trade-mark laws, but this opinion was rendered before the Philippine Islands were formally ceded to the United States by Spain. In 25 Op. Atty. Gen. 179 (July 6, 1904), it is held that the copyright laws do not apply to the Philippine Islands, but the Attorney General bases his opinion on that of his predecessor and his whole opinion is so mixed up and illogical that it would not seem to have much weight as authority.

In a more recent and better opinion of the Attorney General, 30 Op. Atty. Gen. 462 (Oct. 28, 1915), it is held that :

"While, like Porto Rico, the Philippine Islands are not incorporated into the United States, they clearly are territory of the United States, and to the extent that Congress has assumed to legislate for them, they have been granted a form of territorial government, and to this extent are a territory. Though their form of government is not identical with that of Porto Rico, the reasoning of the opinions in the cases *supra* holding that, for certain purposes, Porto Rico is to be deemed a territory, as that word is used in various Federal statutes, is clearly applicable to the Philippine Islands. R. S. Sec. 5546, draws no distinction between an 'organized' or 'unorganized,' 'incorporated' or 'unincorporated' territory. Considering the purpose for which it was enacted and the convenience of administration of the present laws which it was intended to promote, I see no reason why the term 'territory' should not be given a broad construction in order to effectuate the evident needs of the statute."

Presumably Webb' Law Not Applicable to Philippine Islands.

As far as the Webb-Pomerene Law and the Sherman Anti-trust Law are concerned the Philippine Islands are as much a "territory" as Porto Rico, and as stated above, the courts have held that the Sherman Anti-trust Law is in force in Porto Rico.

But, let us examine the Philippine Act of August 29, 1916, ch. 416, Sec. 5 of which expressly provides that:

"The statutory laws of the United States, *hereafter* enacted shall not apply to the Philippine Islands, *except* when-

ever so specifically provided, or it is so provided in this Act," and Sec. 10 of which provides:

"While this Act provides that the Philippine government shall have the authority to enact a tariff, *the trade relations between the Islands and the United States* shall continue to be governed exclusively by the Congress of the United States."

Does the Webb-Pomerene Law specifically provide that it shall apply to the Philippine Islands, in compliance with Section 5 of the Philippine Act? Not unless this is done by use of the word "territory." It is extremely doubtful whether any court would hold that by using the term "territory," the Webb-Pomerene Law is made to apply *specifically* to the Philippine Islands.

It would seem, therefore, that the Philippine Islands do not come within the terms of the Webb-Pomerene Law in any way—that associations may not export goods from the mainland to the Philippine Islands, and that associations may not be formed in the Philippine Islands to export to foreign countries.

The Panama Canal Zone

Canal Zone "A Part of the United States."

The Panama Canal Zone is a part of the United States¹ to which Webb Law associations may not export goods. It was contended in *Wilson v. Shaw*, 204 U. S. 24 (Jan. 7, 1907), that the Canal Zone was not "a part of the United States," but Justice Brewer in his opinion held:

"It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate."

The fact that the United States treats the Canal Zone as a foreign country in matters of tariff,² etc., is beside the question. We have discussed this matter at length on pages 190 to 191

¹Treaty between the United States and the Republic of Panama, Feb. 18, 1903 (33 Stat. 2234).

²See *David Kaufman & Sons Co. v. Smith*, 175 Fed. 887 (Jan. 13, 1909).

above, in connection with the Porto Rican case of *Downes v. Bidwell*.

Canal Zone Not a "Territory."

But the Panama Canal Zone does not come within the description of "territory" as defined in *In re Lane*,¹ and associations may be formed in the Canal Zone to export goods to foreign countries.

Guam, Tutuila, Guano Islands, etc.

Webb Law Not Applicable.

Webb Law associations may not export goods to Guam, Tutuila (American Samoa), the Virgin Islands, Guano Islands and our more or less uninhabited islands such as Wake Island, Baker Island, Howland Island, Midway Islands, etc., all of which are possessions of the United States, and not "foreign countries." It is not at all likely that an association would want to ship goods from these islands to foreign countries, but if such a question should arise, it seems quite clear that they could not form export associations there, since none of these possessions are "territories" of the United States.

JURISDICTION OF EXPORT TRADE LAW SUMMARIZED.

To sum up the various decisions discussed above, it would seem, *first*, that Webb Law associations may not ship goods to Hawaii, Alaska, Porto Rico, the Philippine Islands, the Panama Canal Zone or any other part of the United States, but that they may export goods to Cuba and the Isle of Pines; and, *second*, that Webb Law associations may be formed in Hawaii, Alaska and Porto Rico, but not in the Philippine Islands, the Panama Canal Zone, Guam, Tutuila, the Guano Islands, the Virgin Islands, etc.

Power to Amend Webb-Pomerene Law.

Congress may, under its power to legislate for the territories,

¹See above, p. 188

amend the Webb-Pomerene Law so as to allow Webb Law associations to ship goods from the mainland of the United States to its territories and possessions. But it would seem hardly fair to the territories of the United States, including Hawaii, Alaska, Porto Rico and the Philippine Islands (all of which are subject to the provisions of the Sherman Anti-trust Act), to allow export associations to ship goods to them, without equalizing the commercial situation by exempting those jurisdictions from the trade-restraining provisions of the Sherman Anti-trust Act.

ASSOCIATIONS.

MEANING OF THE TERM "EXPORT ASSOCIATION."

In paragraph 3 of Section 1 of the Act the term "association" is defined as follows:

"That the word 'association' wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships or corporations."

We note that Congress plainly employed the term "corporation" in its associated sense, that is, as meaning a coming or joining together of separate entities (competitors, non-competitors, or both) in one common enterprise, or joint venture. It is apparent the words "corporation or combination" are used as corresponding terms; and this being so, the "corporation" is equivalent to the "combination" for export purposes. While this employment of the word "corporation" is correct in a dictionary sense, it is not the usual meaning; but where the term "corporation" appears at the end of the sentence, it is obvious that the bill-draftsman referred to incorporated bodies, operating under state-granted charters.

In Section 2 such an association, organized and actually engaged solely in export trade, is exempt from the Sherman Anti-trust Act under certain conditions. Regarding the question of whether or not every simple corporation which might happen to be engaged solely in export trade comes within the definition of

the term "association," when it is not violating the Sherman Law, and not in actual association or combination with others, see page 250.

Wide Latitude When Forming Export Association.

Under the definition of the term "association," various forms of combinations of two or more persons, partnerships or corporations are sanctioned. In actual practice, we find, first, combinations whose constituent members are linked together by contract and who operate under articles of association and by-laws filed with the Federal Trade Commission. Such unincorporated "associations" may embrace in their membership individuals, partnerships or corporations who outside of the export association, that is in domestic trade, are competitors. Or the constituent members may in domestic trade be engaged in related but non-competing lines. Then again, the membership of an export "association" may be composed of competitors and non-competitors.

The second form of combination consists in an incorporated association, of which the constituent members are stockholders. Export associations of this class operate under state charters and by-laws filed with the Federal Trade Commission.

THE EXPORT ASSOCIATION AND THE FEDERAL CONSTITUTION.

There exists a two-fold question which has peculiar interest for us here:

First: What is this "association" which Congress has seen fit to provide as the medium by which American manufacturers and exporters are to conquer foreign trade?

Second: What are the constitutional boundaries beyond which Congress may not go, when providing this vehicle for export commerce?

Taking up these natural and necessary divisions of our theme in their order, we will first briefly discuss

The Nature and Scope of Export Trade Associations.

The composite body denominated an "association" and described and defined in Section 1 of the statute is in effect a special foreign-service corporation, organization whereof is authorized by the Webb-Pomerene Act in accordance with powers conferred upon Congress under the commerce clause of the Federal Constitution—"The Congress shall have power to regulate commerce with foreign nations, among the several States and with the Indian tribes."

Unquestionably this "power" includes the right to create bodies suitable for the carrying out of business transactions in connection with these commercial rights; indeed, the Constitution clearly suggests—yes, actually denotes—"an affirmative power of regulation placed in the hands of a sovereign government." *Heisler on "Federal Incorporation,"* page 2. The same able author continues (also on page 2) :

"There has been such a vast change in the character of commerce itself and in the instrumentalities by which it is carried on, and the subject has become of so much greater importance, that a power of regulation at the present time may include within its scope far different measures than were ever contemplated at the time of the adoption of the Constitution."

In brief, when the members of the Constitutional Convention of 1788 decided to confer upon Congress the power to regulate commerce, foreign or domestic, it is not unreasonable to assume that it was in their minds to permit Congress to designate or create the subordinate bodies or media by and through which that power was to be made effective and fruitful. If further argument is required (and we think the mere statement of the case carries conviction with it), we find such advocacy in the obvious intention of the Fathers of the Constitution to free our commerce, whether domestic or foreign, from the shadow of onerous burdens and restrictions liable to be imposed by authority of the individual States.

The "association," thus recognized and defined in Section 1 of the Act, constitutes an entity which has peculiar rights in

foreign trade. It is an anomaly, since it need be neither a corporation nor partnership—may be a mere arrangement to proceed jointly in the common venture; and yet it is dignified by the grant of powers of the first order in magnitude. Accordingly, how those powers shall be construed becomes a matter of interest and may well become a vital question, when problems of that description arise.

The nearest approach to bodies thus constituted will be found, we believe, in corporations organized under a general incorporating statute. There being no general Federal incorporating law, we must turn by analogy to the principles governing corresponding grants of corporate powers in state legislation.

In *Fletcher Cyclopaedia Corporations* Vol. 1, par. 226, we find this lucid and clarifying statement:

"Strictly speaking there is no Charter where a corporation is created under a general law. However, the incorporation papers, whether called articles of incorporation, application for incorporation, certificate of incorporation or any other term, together with the signature, seal or decree of approval, are often referred to as the charter, although as a matter of law, the so-called charter consists of such papers and (also) the statutes under which the corporation is created. In other words, the provisions of the statute or general incorporation act enter into and form a part of the charter, and the incorporation papers and statute are to be construed together, the latter controlling in case of a conflict.

"It is not necessary that the general law should be copied in the charter, but it forms an essential part of it, and all parties are bound by its terms, whether copied in the charter or found only on the statute book. Moreover, constitutional provisions automatically become a part of the charter."

At page 1739, par. 765, of the same excellent treatise, the subject is further commented upon:

"The articles or certificate cannot confer powers in violation of a statute; and it is sometimes held that, unless clearly authorized by statute, the articles or certificate cannot confer powers denied or not recognized at common law."

However this may be, we are not here concerned with the question of common law, since that department of things legal

(the common law) does not come within the confines of Federal jurisprudence.

See *Republican Mountain Silver Mines v. Brown*, 58 Fed., 644, cited at page 1737, as to the reasonable extension of corporate powers to meet the exigencies of business. This case says, (page 647):

“Corporations are in a sense legislative bodies. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle all questions affecting their business interests or policy.”

The conveniences of business are so much promoted by the adoption of corporate forms that it is probable most of the export associations will be corporations; but even though the organizers elect to submit the venture to the risk of dissolution by death of the principals or to the jeopardy of unlimited liability—features which pertain to and characterize partnerships and mere informal business relationships—the aegis of the Act will be present to protect the association in export trade. As has been asserted, and we trust abundantly shown, the association is the duly authorized medium for engaging in export trade; and (excepting that it does not provide for an enterprise conducted by an individual), the statute leaves the widest latitude for those persons who are framing the commercial organization. It—the “association”—has no descriptive or defining chapter in any law-treatise; it is too new for mention in the volumes of reported cases; but we confidently believe this novel legal entity will be accorded a reasonably broad construction of its powers and will suffice for the useful purpose for which it has been instituted by Congress. It is certainly built along corporate lines.

Entering upon the second phase of our immediate topic, let us now consider

Constitutional Powers of Congress as to Conferring Franchises.

The grant of authority must be found in these provisions of the Federal Constitution:

Art. 8, par. 3. “The Congress shall have power—To

regulate commerce with foreign nations, among the several States, and with the Indian tribes."

Art. 3, par. 2. "* * * to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Art. 8, par. 18. "* * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

That these basic grants of powers impart to Congress authority to confer franchise upon corporations has never been seriously questioned since the opinion by Chief Justice John Marshall in *McCulloch v. State of Maryland* (4 Wheat. 316), in 1819. It held Congress possesses the authority to employ incidental and implied powers, to effectuate proper constitutional ends; that to charter (for instance a bank) is the proper exercise of such implied powers, since it is employed as the appropriate means of carrying into effect a sovereign right; and that such power ranks so highly that no State may, by imposing taxes upon the organized body, jeopardize the continuous and useful enjoyment of those chartered privileges. The Chief Justice (page 409) states the keynote of his famous ruling in these words: "The government which has the right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."

Which is to say, that granted the constitutionality and legitimacy of the object sought to be attained, Congress might create the means to accomplish that proper end by providing a form of incorporated body suitable to the purpose.

Five years later, (in 1824), the same distinguished jurist, in *Gibbons v. Ogden*, 9 Wheat. 1, 196, when construing the commerce clause (Art. 8, par. 3) of the Federal Constitution, and analyzing and defining the power thereby conferred upon Con-

gress, enquires—"What is this power?" and this interrogation he then proceeds to answer:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."

Thus, by confining ourselves to these bed-rock decisions (rarely seriously questioned, never disturbed), we find ample authority for proceeding confidently upon the assumption—

First. Congress may organize an artificial person (corporation) for the purpose of effectuating any of the powers it possesses under the general grant conferred by the provisions of the Federal Constitution.

Second. Since Congress, by express grant, (see Commerce Clause of the Constitution) possesses power to "regulate commerce with foreign nations"—it is entirely plain that it may provide a form of corporation or organization appropriate to this purpose, and may equip it with all things necessary to carry out the useful purpose of advancing American interests in foreign trade.

The people of the United States are indeed fortunate in having the doctrines of the Constitution expounded by such great and lucid judicial utterances. Referring to the opinion of the Chief Justice in the *Gibbons v. Ogden* decision, an able author, ("*Watson on the Constitution*," Vol. I, page 471) has thus stated his estimate of the high quality of this ruling—"The path before him was untrodden by any federal decision * * * and the questions presented were of most vital importance. His opinion in which no authority was cited was so able, so profound and masterful that it announced the principle which all future decisions have followed."

INCIDENTAL POWERS OF "ASSOCIATIONS" ORGANIZED IN CONNECTION WITH THE WEBB-POMERENE EXPORT TRADE ACT.

We have already dealt with the powers with which export "Associations" are endowed by the creating act and have en-

deavored to show that in effect these organizations are concerns operating under a special statute. If we are correct in this diagnosis of the aspect of the legal situation which has developed as the result of the novel provisions and phraseology of this statute, it follows that each "association" has upon it the distinctive mark and imprint of the Export Trade Act; and this is so, regardless of what language is employed by the framers of this corporate constitution or by-laws; for, as was held in well-known decisions—these powers are not confined to the list enumerated in the charter or articles of incorporation, but embrace all those powers conferred by the statute itself. In case of conflict, however, the provisions of the statute outweigh those of the charter. (See *Westport Stone Co. v. Thomas*, 175 Ind. 319; and *David Bradley Manufacturing Co. v. Chicago, etc., Ry. Co.*, 229 Ill. 170.)

Incorporators under General Law Take Full Powers.

This right to proceed under the general powers conferred by the enabling statute is especially valuable here; for numerous concerns doubtless will proceed quite informally as to the manner of their entrance into export trade, and reasonable compliance with the requirements of the act presumably will be accepted by the Federal Trade Commission and the courts as declaratory of an intent to claim the benefits of the Act. It will thus readily be seen how advantageous it is for the framers of the organization to have all statutory grants of power conferred upon it without expressly enumerating them in the charter.

We must not be drawn into loose ways of thought, however, merely because under the modern method of authorizing the organization of corporations in groups, i. e., granting the right to organize under a general law—very extensive powers are conferred; for there are strict limits beyond which corporations may not act. Thus, while an individual may engage in any course of business not prohibited by law, a corporation (upon the contrary) is prohibited from exercising powers not granted to it by statute—see *Seattle Gas & Electric Co. v. Citizens, etc. Co.*, 123 Fed. 588.

Implied Powers Conferred.

As appears herein at pages 204, 227, there are, however, powers implied from powers expressly granted. Some efforts have been made by courts and text writers to draw a distinguishing line between incidental and implied powers; but the exceptions crowd so hard upon the rule that we will be safest when we concede that the two terms are practically synonymous—*distinctio sine differentia*—and abandon all efforts to discover a difference in their several meanings.

The resultant rule has been variously expressed in authoritative quarters; but we think the principle is nowhere more clearly set forth than by the Missouri Supreme Court in the leading case, *Blair v. Perpetual Insurance Co.*, 10 Mo. 559:

"The incidental powers may be, and are, frequently restrained by the terms of the charter. When they are not thus restricted, they can only be exercised for the purpose of carrying into effect the ends for which the corporation was designed. It is a well-settled principle that a corporation has no other powers than those which are specifically conferred upon it, and those which are necessary to carry into effect the powers expressly delegated."

Implied Powers Classified.

In way of insuring a clearer understanding of the subject, we shall endeavor in a general way to classify these implied or incidental powers; admitting, however, that each group of powers is capable of enlargement to fit exceptional cases, since no list can be all-inclusive.

First: Acts in the usual course of business. This group authorizes executing notes and borrowing money; making ordinary contracts; and in short performing all such acts as are essential to carrying on a going enterprise.

Second: Acts to protect debts owing to the corporation. Courts have been very liberal in extending considerate treatment where conservation of corporation assets is concerned; and this includes collecting in outstanding accounts. Purchase

it must be admitted most of the litigated cases turn upon points arising by reason of the corporation's desire to increase its business; hence it may well be that a somewhat similar condition will arise under the Export Trade Act, as matters develop.

While the rules laid down in these five divisions are, in general, well settled, and have in fact ceased to be seriously questioned by courts or law writers, still there is great difficulty in applying those rules. Many cases come close to the dividing line. In instances of that description, reference must be had to the best authorities and latest rulings. Perhaps most exhaustive and most useful of all is *Fletcher Encyclopedia Corporations*. See Vol 2, chapter on "Powers in General;" also, Vol. 3, chapter dealing with "Ultra Vires."

Ultra Vires Principle Limits Corporate Powers.

It is not worth our while to go into the questions involved in a study of the *ultra vires* principle as applied to export "associations;" for no subsequent ratification by stockholders could legalize corporate action reaching outside the scope of the empowering Act; and in many other directions the *ultra vires* doctrine as it restricts or otherwise concerns the broad grants of power conferred by a general corporation act does not at all apply here; and consequently it is useless to determine whether, measured by those prescribed tests, the export "association" has exceeded its powers. Where the "association" is itself a corporation acting under some state-granted franchise, enquiry whether the usual rules as to management and procedure would apply *per se* as to its corporate acts is an attractive—even alluring—topic for discussion; but we are here concerned only with those principles and regulations which are applicable to "associations" (whether incorporated or not) organized under the Export Trade Law; and those rules of statutory construction which govern corporations generally and can have at most only a limited application, are not really pertinent in a sphere where the activities of the organization are strictly confined to matters connected with export trade. This conclusion is surely justified

as to the application of *ultra vires* rules to export "associations;" and with regard to the general proposition of their application to corporations in general, we think a plain suggestion has been made in this Chapter as to the tendencies of the courts when defining the boundaries of corporate powers. More than this treatment would not be appropriate here; and somewhat reluctantly we must refer the reader desiring an enlarged study of this theme, to *Brice on Ultra Vires* (Eng.), Third Edition, 1893; also, *Rees on Ultra Vires*, 1897; and, *ad abundantioram cautelam*, the enquiring student should also go afield among the general text writers upon corporation law. In almost every instance a chapter will be found dedicated to this subject; although the preface to *Morawetz on Corporations* states "the expression '*ultra vires*' has not been used in the text, partly because it is too vague to serve any useful purpose, and partly because the variety of meanings attributed to it lead to inevitable confusion of thought." This resembles cutting down the tree to effect a cure of the fruit; and some measure less radical can doubtless be devised for discounting the looseness with which the term is applied without entirely discarding its employment. Whatever the word or words utilized to express the idea—it cannot be denied that the doctrine of *Ultra Vires* exists; and no well-equipped student of corporate affairs can afford to pass the subject by and to default in giving it his earnest attention, even though it has only a limited application in affairs pertaining to "associations" operating under the somewhat technical and narrow limits of the Webb-Pomerene Export Trade Act.

CHAPTER XIII.

Sections II-III of the Webb-Pomerene Law.

Price-Fixing.

Is price-fixing alone sufficient to qualify under the Webb-Pomerene Act, or is actual exporting required of an association? Whether or not an export association, whose functions consist principally, if not exclusively, in fixing or regulating export prices for its members, would qualify under the Webb-Pomerene Act, depends upon a number of considerations.

It can readily be conceived that many manufacturers who desire to carry on their export trade individually through their own established channels instead of selling jointly with others, would nevertheless be willing to enter into an agreement with their competitors regarding export prices, if it could be done lawfully under the Act. Many European trade associations confine their activities simply to the fixing of prices, mainly for the home market. They are known variously as price cartels, price combines, etc.

The question immediately arises, whether an association, which engages primarily in fixing export prices, complies with the specific provisions of Sections 2 and 5 of the Act which require that the association *per se* shall (a) "be entered into for the sole purpose of engaging in," and (b) "be actually engaged solely in export trade."

Language of Statute Grammatically Construed.

The most natural grammatical construction of these two quoted clauses seems to be to consider the word "actually" as modifying the verb "engaged." The meaning thus conveyed in Section 2 would be to the effect that associations must not only

be entered into, but must actually be *engaged* in "export trade," as that term is defined in Section 1. That is, export associations must actually be engaged in trade or commerce of goods, wares or merchandise exported from the United States to a foreign nation.

The current meaning of "trade" (see *Webster's New International Dictionary*, 1912) is "to be engaged in the exchange, purchase or sale of goods, etc." Availing ourselves of this definition, we have the functions of export associations formulated as follows, viz., *they shall be actually engaged solely in the exchange, purchase or sale of goods shipped from the United States to a foreign nation.*

Obviously this interpretation would preclude an association merely passive or dormant in its functions. Moreover, an association functioning primarily as a price-fixing agency could hardly be considered as being actually engaged in selling goods to foreign nations. Furthermore, the quantity of goods actually sold by the export association, it would seem, should represent a fair proportion of the total quantity of export goods of the participating members of such association. It would appear to be a mere "camouflage" to sell a few articles jointly through the association, while each individual member is exporting independently of the association, co-operating with his fellow members only in respect of prices.

Other Reasons Adverse to Price-Fixing.

Added strength is given to the foregoing view by the fact that when the Federal Trade Commission recommended to Congress the enactment of legislation permitting export trade associations, it advised "that they be limited to the activities of selling goods, as distinguished from their production or manufacture."¹ Moreover, during the debates in Congress on the Webb bill it was repeatedly stated² by Representative Webb and

¹U. S. Federal Trade Commission. Report on Co-operation in American Export Trade, op. cit., Pt. I, p. 380.

²Congressional Record, June 13, 1916, p. 3851; Sept. 2, 1916, p. 15983; Dec. 11, 1917, p. 166.

others that the associations which were contemplated under the terms of the bill were to engage in selling. Finally, an examination of the mass of discussions, hearings, etc., on that bill, in and out of Congress, shows that the generally prevailing opinion was to the effect that associations, when functioning under its provisions, should operate as bona fide exporters of American goods.

Arguments Which Price-Fixing Interests Advance.

Ovcr against the foregoing view it has been contended that export associations concerned with fixing export prices but strictly selling nothing in export trade would still be engaged solely in trade or commerce within the meaning of the Webb-Pomerene Act, if the term "commerce" be taken in a broader sense than the term "trade."

It is argued that each of the distinct operations involved in selling or "trade" constitutes "commerce" within the legal meaning of that term. It is further claimed "that persons engaged in only a single type of these operations, and having nothing to do with the other operations which go to make up selling or 'trade,' are nevertheless engaged in 'commerce' just as truly as those who perform the entire series of operations that constitute selling or 'trade.'" In furtherance of this view it is argued that the word "actually" in Section 2 modifies the word "solely," and that no distinction is there made between "entered into" and "engaged in" export trade, the wording of the Act merely emphasizing the fact that an association must engage *solely* in export trade.

The points discussed in the foregoing lead us to the further question of what would constitute the minimum functions required of an export association under the Webb-Pomerene Act. However, in the absence of a special ruling on the whole subject by the Federal Trade Commission or a court, a discussion of assumed facts would be of academic value only and without practical importance, although we may properly register our opinion that price-fixing is not tantamount to engaging in traffic;

and that such acts, standing alone, will not justify an association when claiming to be "actually engaged solely in export trade."

RESTRAINT OF TRADE.

Effect of Export Combinations Upon Domestic Trade.

Among the objections urged most strongly against export trade combinations, when the Webb-Pomerene bill was under consideration, prior to its passage by Congress, were those voicing the fear that, if legalized, such combinations might be used as a blind to cover attempts to restrain trade at home. This danger was clearly recognized, and the present wording of the Act represents careful efforts to guard effectually against possible attempts to oppress trade within the United States. It was the avowed intent of those who framed the legislation and of Congress¹ not to repeal or render nugatory the provisions of the Sherman Law covering restraint of trade within the United States, while at the same time legalizing the operation of associations engaged solely in export trade.

Safeguards against restraint of trade are contained in Section 2 of the Act, viz., "provided such association, agreement or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association" * * * "or otherwise restrains trade therein" (viz., in the United States). Again, in Section 3 the acquisition or ownership by a corporation of stock or capital of any corporation engaged solely in export trade is legalized "unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States." Finally, in Section 5 of the Act the Federal Trade Commission is given certain investigatory powers, whenever it "shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the

¹See U. S. Federal Trade Commission. Report on Co-operation in American Export Trade, op. cit., Pt. I, p. 376 fol. Hearings before the U. S. Senate Committee on Interstate Commerce, op. cit.

United States or in restraint of the export trade of any domestic competitor of such association, or that an association * * * otherwise restrains trade therein" (viz., the United States).

Two Resultant Problems.

The question arises what constitutes (1) restraint of trade within the United States by an export association or an agreement made or act done by it, and (2) restraint of the export trade of any domestic competitor of an export association.

The restraint of trade prohibited by the Sherman Law is of two kinds, viz., first, voluntary restraint, i. e., suppression of competition by voluntary agreement or combination among competitors, and, second, involuntary restraint, i. e., elimination of an outsider by means of such a voluntary combination. In the latter case the contracting parties direct restriction *against* a competitor. As both forms of restraint are prejudicial to the public interest, the Sherman Law prohibits them.¹

Competition in Export Trade Eliminated Between Members.

The Webb-Pomerene Law, however, legalizes the first kind of restraint mentioned above, i. e., voluntary restriction of competition among co-operating members of an association engaged solely in export trade. It legalizes this, but it penalizes the other kind, the restraint of competition directed against a competitor, who is outside of the combination. "By authorizing combinations * * * otherwise prohibited by the Sherman Law, for the purposes of export trade, Congress has declared that the protective policy embodied in the Sherman Law shall no longer obtain for the public of foreign nations. * * * Competition which affects only the foreign public may, therefore, be suppressed without liability under the Sherman Law. It quite consists with this policy, however, that competition between the combining exporters in the markets of the United States shall not be suppressed." Within the United States a normal com-

petitive regime shall remain in effective operation. "And this is precisely what is said and all that is said by Congress, by the proviso that export combinations may not be in restraint of trade within the United States."¹

In this connection it should be emphasized, however, that the Webb-Pomerene Law does not license "trusts" to exploit foreign markets, nor does it constitute a franchise to injure foreign competitors or to engage in unfair trade practices. Whoever attempts to read that into the Act will disregard the intent and purpose of Congress expressed in unmistakable terms when that body had the Webb Bill under discussion. Furthermore, he will do violence to the express wording of the Act itself. And finally, he will make the mistake of failing to take account of the powers vested by law in the Federal Trade Commission in matters relating to our domestic as well as foreign trade.

Non-members Retain Right to Compete.

The second question, "What constitutes restraint of the export trade of a domestic competitor of an export association," involves a number of additional considerations. This kind of restraint constitutes what we designated above as involuntary restraint, or elimination by a combination of a competitor—an outsider. Such restriction of the export trade of a domestic competitor is contrary to the established American principle that "every individual has a right recognized by law to pursue his trade or calling free from unreasonable interference by others." This right of an individual exporter may be interfered with unreasonably by an export combination when the latter resorts to oppressive practices and engages in unfair methods of competition against the individual exporter.

In conclusion, we quote Senator Pomerene's answer in the course of the debates on the Webb-Pomerene Bill to a question by Senator Cummins as to the meaning of the words "in restraint of trade," as follows:

¹L. H. Bissell. "The Webb Act: Its Legal Aspects."

"Mr. Pomerene. Mr. President, I take it the words 'in restraint of trade' have been definitely defined by our Supreme Court in the Standard Oil and the American Tobacco cases, and that judicially construed they mean any undue restraint of trade. The Senator from Iowa asks me as to what would be the effect of a reduction of prices by perfectly legitimate methods employed by these associations. I answer if they were to attempt by any method of unfair competition to interfere with the trade of a domestic competitor that act would be under the control of the Sherman Anti-trust Law and would not be protected under the pending bill. If the larger association was able by reason of its greater efficiency or by exercise of greater economy in its methods of distribution and sale to reduce the price of the article then of course, that would be a kind of competition which would not be objectionable under the law."¹

ARTIFICIAL ENHANCING OR DEPRESSING OF PRICES.

Reflex Action Upon Domestic Prices.

Records of hearings before the Senate Committee on Interstate Commerce and the House Committee on the Judiciary, occurring respectively in January and July, 1917,² show conclusively that there was a general fear upon the part of the American public that the Export Trade Bill, when enacted, would provide some new engine for predatory trade manipulation, and that the last state of the commonwealth would be worse than the first. In brief, it was feared that American exporters would come together in foreign trade and by agreement, so rig the domestic market by the artificial acceleration of exports that excessive prices would there obtain. This fear was quieted rather effectually by reference to the qualifying words (Section 2) "not in restraint of trade within the United States" which alone stand between the exporter and the terrors of the Sherman Law; and it was pointed out that such conduct by our merchants engaged in foreign trade would also fall

¹See Congressional Record, Dec. 12, 1917, p. 281.

²See also Congressional Record, Dec. 12, 1917, pp. 177, 189.

under the inhibition directed against "any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein." Furthermore, it is expressly stated (Section 4) "that the prohibition against unfair methods of competition and the remedies for enforcing said prohibition" contained in the Federal Trade Commission Act remain in full force and effect as to the export trade of the United States; and no doubt wilful measures tending to corner the home markets would be deemed "unfair" by the Commission, and treated accordingly.

Statutory Provision Amounts to Licensing Expedient.

All of which goes to show that our exporters in effect are licensed dealers only; and when they act in opposition to the interests of the people of the United States and gain unfair advantages by trick and device, the disciplinary machinery of the Federal statutes is capable of dealing with such cases severally to a degree which is equivalent to cancellation of their right to engage in foreign trade.

Commission Considers Possibility of Domestic Price Manipulation.

The Federal Trade Commission in stating its conclusions as to the advisability of permitting combinations in export trade, discussed the probable effect of export combinations on domestic prices as follows:¹

"The question may be raised as to the effect of export combinations on prices in this country. Prices to the domestic consumers are always likely to be affected where changes occur in the volume of export trade, whether such changes are due to the efforts of an export combination or

¹U. S. Federal Trade Commission. Report on Co-operation in American Export Trade, op. cit., Pt. I, p. 376 fol.

to other causes. For some products, particularly among manufactured articles, there may be some lowering of the domestic price. With the broader market, larger-scale manufacture will be possible. The resulting economies may lower the cost of production per unit, and with competition in the domestic market the natural tendency under such conditions of lower cost would be to lower prices to the domestic consumer.

"On the other hand, prices to the domestic consumer may, in some instances, be raised through an increase of exports brought about by encouraging producers to seek a broader market for American products. The rise may be either temporary or permanent, according to the particular circumstances under which the commodity is produced; but in either instance it will be the result simply of increased exports. The domestic price for certain manufactured goods might be temporarily raised, but be followed by an increase of productive capacity, which would augment the supply and bring down the price. Should, however, the commodity be a raw material of the kind that increases in cost per unit as the quantity is increased, or a manufactured article in which such raw materials are the principal factors of cost, then there is likely to be not only a temporary but also a permanent rise in both the domestic and export prices. This would happen regardless of whether the increased exports are due to export combinations or to other causes.

"When competitive forces are given free play price adjustments of this character have been the rule in the past and will continue to be in the future. They are a consequence of the broadening of a local market for a commodity into a national and eventually into a world market. An increase in facilities for developing the export trade will merely accelerate the period of transition in the same general manner as would result from an increase in facilities of transportation in any region of supply by furnishing a link between demand and supply, and thereby giving the supply an increased value.

"The foregoing discussion relates solely to commodities in which the prices are fixed by competition. Any increase in the domestic price due to actions in restraint of trade to which American firms might be parties, including any accomplished through participation in so-called international

agreements between themselves and foreign firms, can and must be dealt with, as already stated, under the provisions of the anti-trust laws."

DUMPING OF AMERICAN GOODS ON FOREIGN MARKETS.

One of the principal charges made in foreign countries against American "trusts" is that they practice what is known as "dumping," that is, charging less for export goods than the prices being charged for the same class of goods in the domestic market. At one time or another the charge of dumping has been made against every modern industrial nation, and so-called anti-dumping laws have been enacted and are being contemplated at the present time in several countries, including our own. It is not surprising to find that already the Webb-Pomerene Law has been singled out for attacks on this score.¹ This eventuality was foreseen, when the present law was drafted, and safe-guards were provided to suppress such practices should they be attempted.

For our present purpose it is significant to note that the term "dumping" has been in the past and is still being used very loosely, different meanings being given to the same word. Official investigations in this country and abroad have established the fact that most cases of alleged dumping were nothing else than keen competition of cheap foreign goods.

Dumping Assumes Several Distinct Forms.

So-called dumping may be due to the fact that one country with cheaper labor, greater efficiency, large-scale production, etc., can produce goods at a lower cost of production than a competing country, and can therefore undersell the latter in the latter's market, and do so at a profit. There is nothing unfair about this, although it may require means of correction and self-protection on the part of the country that suffers. The fluctuation in international exchange may underlie other alleged cases of dumping. Moreover, mere temporary export sales of surplus

¹See p. 313.

goods, old and accumulated stock, "seconds," etc., at bargain prices need not necessarily involve an element of unfair competition.

An entirely different situation arises in case of a permanent and deliberate export policy of selling abroad below the domestic price. Some consider this policy justifiable from an economic point of view. They look upon the foreign market as a safety valve against over-production at home, and believe in selling abroad their surplus output, as a by-product, for whatever price it will bring. That part of their output allotted to export trade constitutes the marginal volume needed to keep their plants working efficiently.

However this may be, a policy of deliberately selling cheaper abroad than at home with the avowed purpose and intent of putting rivals out of business or otherwise injuring them, no matter whether they be domestic or foreign competitors, by means of predatory price-cutting and other unfair methods, doubtless is repugnant to good morals and contrary to law.¹

The payment of export bounties may serve a similar purpose, and serve as a cloak for a permanent dumping policy which by common agreement among nations² is objectionable.

Export Trade Act Can Restrain Dumping.

Thus far the remedies applied against dumping consisted in protective measures established by various countries against the dumping of foreign goods in their markets. The Webb-Pomerene Law marks a new stage in this field of commercial legislation. It offers a means of suppressing dumping by domestic parties in foreign countries. Whenever the practice of dumping involves an artificial or intentional enhancement of domestic prices, restrains the domestic trade or injures an American competitor in export trade, whether it be carried on by an export association or by an individual, it can be reached under the terms of the Webb-Pomerene Law and effectually arrested.³

¹See Chapters on "Extraterritorial jurisdiction of the Webb-Pomerene law," p. 221; and on "Unfair Competition in Foreign Trade," p. 237.

²See p. 383.

³See p. 239.

CHAPTER XIV.

Sections IV-V of the Webb-Pomerene Law.

Extraterritorial Jurisdiction of the Webb-Pomerene Law¹

I.

SECTION 4—EXTRATERRITORIAL JURISDICTION OVER ALL EXPORTERS, INDIVIDUALS AS WELL AS ASSOCIATIONS.

As most of the provisions of the Export Trade Act relate to export "associations," their powers, limitations, duties, etc., the Act has in the public mind become identified chiefly with the subject of export trade combinations. In the numerous publications and discussions on the law no account has been taken, up to the present time, of a special feature contained in Section 4 of the Act. That section apparently has no direct connection with export "associations." The term "association" is not even mentioned in it. The scope of Section 4 is of a wider nature, extending to American export trade in general. It is a significant fact that Section 4 established a new principle in our foreign trade policy, viz., the extension of the "unfair competition clause" (Section 5) of the Federal Trade Commission Act, so as to make it apply to acts constituting such unfair methods committed without the territorial jurisdiction of the United States.

Section 4 of the Export Trade Act provides as follows:

"That the prohibition against 'unfair methods of competition' and the remedies provided for enforcing said prohibition contained in the act entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and

¹See article on "The Webb-Pomerene Law—Extraterritorial Scope of the Unfair Competition Clause," in *the Yale Law Journal*, November, 1919, vol. 29, no. 1, pp. 29-45.

for other purposes,' approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States."

The foregoing section of the Act involves a number of interesting points, important from a legal as well as an economic point of view. Under this section the Federal Trade Commission is empowered to issue and serve a complaint containing a notice of a hearing upon *any* American person, partnership or corporation concerning which it has reason to believe that such party has been or is using any unfair method of competition in export trade against competitors engaged in export trade, even though such acts are done in a foreign country. If the Commission believes, as a result of a hearing, that the method of competition in question is unlawful, it may issue an order "to cease and desist." The Circuit Court of Appeals of the United States, within whose circuit the methods of competition in question are used, where the defendant resides or carries on business has the power to affirm, enforce, set aside or modify the order of the Commission. Apparently this provision of the Webb-Pomerene Act makes the "unfair competition clause" of the Federal Trade Commission Act a personal statute binding upon the citizens of the United States everywhere. By inserting Section 4 into the Webb-Pomerene Law, Congress evidently assumed that the United States has the right to restrain its citizens abroad from doing acts, which if committed within its territory would constitute violations of its statutory law.

SECTION 5—EXTRATERRITORIAL JURISDICTION OVER EXPORT ASSOCIATIONS OR COMBINATIONS.

Section 4 is not the only section of the Export Trade Act in which the jurisdiction of the United States is extended to acts done in the course of trade and commerce in a foreign country. A further and similar provision is embodied in Sec-

tion 5. In paragraph 2 of that section of the Act it is provided that the Federal Trade Commission shall have investigatory powers where

“An association, either in the United States or *elsewhere*, has entered into any agreement, understanding or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States, or otherwise restrains trade therein.”

The Act goes on to say that if the Commission concludes that the law has been violated, it may recommend that the association readjust its business, and if not complied with, the Commission is directed to refer its findings and recommendation to the Attorney General of the United States for such action as he may care to take.

Provisions Jointly Construed.

A comparative analysis of the two sections will bring out several points worth noting. Although extraterritorial jurisdiction is provided for both in Section 4 and in Section 5, there are several differences in the provisions of these two sections. Section 4 provides for extraterritorial jurisdiction over unfair methods of competition used in export trade against competitors in export trade. It is not stated explicitly in this section whether the competitors so to be protected are American or foreign competitors. However, from the debates on the bill in Congress it is quite clear that American competitors are meant.¹ Besides, in Section 1 the words “‘export trade’ wherever used in this Act” are restricted to “trade or commerce * * * from the United States.” Consequently, the words “competitors engaged in export trade” in Section 4 must mean competitors engaged in export trade from the United States. For Congress to go beyond this and enact legislation for the protection of foreign com-

¹See Congressional Record, Sept. 2, 1916, p. 16010.

petitors would be likely to provoke justifiable criticism on constitutional grounds as well as from the point of view of public interest. Legislation of this kind is a matter for each foreign State to provide for itself, as it deems fit,¹ or for joint action among nations engaged in world trade. A report of a special committee accepted and approved by the Chamber of Commerce of the United States at its annual meeting in Washington in February, 1915, stated as follows:

"It would not be sound and economically advisable even from a moral standpoint for this Government to assume to protect consumers and producers in other countries where other conditions prevail and where governments exist with full power to act for the benefit of their own citizens from any results, baleful or otherwise, of business combinations in the United States."

Moreover, no mention is made in Section 4 of "associations," so that as the section stands any American exporter who commits an act of unfair competition abroad against an American competitor becomes amenable to this law. From the debates on the bill in the House of Representatives it appears that the word "association" was omitted advisedly in Section 4. This section was enacted to meet the decision of the United States Supreme court in the case of the *American Banana Company v. United Fruit Company* (213 U. S. 347) and the intent of the law appears to be to hold simple corporations, as well as all individual American exporters, amenable to our laws for violations of the unfair competition statutes committed abroad, not merely combinations or associations of exporters.²

In Section 5, on the other hand, extraterritorial jurisdiction is asserted specifically over export "associations." Jurisdiction beyond the territorial limits of the United States is here made to cover agreements, understandings, conspiracies or acts resulting in three things, viz., (a) artificial or intentional enhancing or depressing of domestic prices of commodities belonging to the same class as those exported by the defendant association, (b) substantial lessening of domestic competition, (c) re-

¹See also p. 311 (Senator Kellogg's statement).

²See p. 376.

straint of domestic trade. In the report of the Senate Committee on Interstate Commerce on H. R. 17350 (the present Export Trade Act), that committee stated that the purpose of Section 5 was to safeguard our foreign and domestic commerce against acts performed outside of the United States by means other than unfair methods of competition. The intent of Congress evidently was to clarify the question as to the jurisdiction of our anti-trust laws over acts committed in foreign countries, which if committed within the United States would be in violation of our anti-trust laws, particularly the Sherman Anti-trust Law.¹

CONSTITUTIONALITY OF SECTION 4 OF THE WEBB-POMERENE LAW.

Can Congress Enact Extraterritorial Legislation?

Naturally the question arises whether Congress has the privilege and power to enact a statute of this scope. In connection therewith the further question presents itself as to the expediency and justice of such action, as well as to the practical operation of such a statute. An examination of the legislation, judicature and the views of some of the leading legal authorities on the subject of offences committed by nationals in foreign territory and to what extent jurisdiction is actually claimed in such cases, will serve as a proper background against which the full importance of Section 4 of the Export Trade Act will stand forth.

Problem Involves Construction of Basic Powers.

Insofar as the constitutional power of Congress is concerned either to extend the unfair competition clause of the Federal Trade Commission Act so as to make it apply to acts committed in foreign territory, or to assert extraterritorial jurisdiction in Section 5 of the Export Trade Act over acts in restraint of trade, etc., committed by export "associations" abroad—such

¹Report No. 1056, 64th Congress, 2nd Session, p. 3 fol.

power we believe is fully granted in Section 8 of the Constitution of the United States. In that section Congress is among other things empowered

“to regulate commerce with foreign nations” * * *

“to define and punish offenses against the law of nations” * * *

“to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.”

Presumably Congress had these provisions of the Constitution in mind when it enacted Section 4 of the Export Trade Act. There is no indication either in the Congressional Committee hearings or the debates on the Webb-Pomerene Bill in both houses that the constitutionality of this section of the bill was ever questioned.

Supreme Court Ruling.

An examination of decisions of the United States Supreme Court explaining the meaning and scope of the phrase “to regulate commerce with foreign nations” will help to make it clear that Sections 4 and 5 of the Export Trade Act are clearly within the legislative powers of Congress under the Constitution. In defining the term “commerce” and “regulated” commerce, Chief Justice Marshall¹ held as follows:

“Commerce, undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is *regulated* by prescribing rules for carrying on that intercourse.”

It is clear that in conformity with this opinion of Justice Marshall, Congress by giving extraterritorial power to the unfair competition clause of the Federal Trade Commission Act

¹Gibbons v. Ogden (1824, U. S.) 9 Wheat. 1, 189, 6 L. ed. 23.

prescribed rules for carrying on commercial intercourse between nations.

In view of the successful and satisfactory operation of the unfair competition clause in domestic trade and commerce, there can be no doubt that the purpose and the end aimed at by Sections 4 and 5 of the Webb-Pomerene Law are legitimate and beneficial to the people of the United States, and that the extra-territorial powers embodied in those sections come within the legislative discretion of Congress. This is in accordance with another opinion of Chief Justice Marshall:¹

"The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Unfair methods of competition in export trade are likely to interfere more or less seriously with free commercial intercourse with foreign nations. In *Northern Securities Company v. United States*,² Justice Harlan held that the power of Congress over commerce embraces devices that may be employed to interfere with freedom in international trade, viz.:

"And all, we take it, will agree, as established firmly by the decisions of the court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the states and with foreign nations."

In the same case,³ it was held that:

"The constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate* and *international* commerce."

¹*McCulloch v. Maryland* (1819, U. S.) 4 Wheat. 316, 421, 4 L. ed. 579.
²(1904) 193 U. S. 197, 344, 24 Sup. Ct. 119.

³*Supra*, 332.

Congress Can Pass Laws to Effectuate Constitution.

Elsewhere it was held that by the interstate commerce clause and that clause of the Constitution giving Congress power to make all laws necessary and proper to carry that power into effect, the national legislature is authorized to give full protection to the commerce of the United States by its criminal jurisprudence.¹ In the *Passenger Cases*² it was held that the power vested by the Constitution in the government extends to every species of commercial intercourse and may be exercised upon persons as well as property.

To sum up, it seems quite clear that Congress acted within its constitutional rights when it extended the unfair competition clause of the Federal Trade Commission Act so as to make it embrace unfair methods of competition used in export trade committed outside the territorial jurisdiction of the United States. By enacting Section 4 of the Webb-Pomerene Law Congress unquestionably "regulated commerce with foreign nations" by "prescribing rules for carrying on that intercourse" and for suppressing devices "that may be employed to interfere with the freedom of commerce with foreign nations."

EXTRATERRITORIAL JURISDICTION OF CRIMINAL LAWS.

Section 4 of the Webb-Pomerene Law is a quasi-criminal³ provision, and that raises the question whether or not the criminal laws of a nation can justly extend beyond its territory as regards its own citizens. There is considerable difference

¹Charge to the Grand Jury (1861, C. C. D. Mass.) 2 Sprague 279.

²(1849, U. S.) 7 How. 283, 12 L. ed. 702.

³The Webb-Pomerene Act is not a criminal law in the strict sense of the term; however, violations of its provisions may in the last analysis lead to criminal prosecution under the Sherman Anti-trust Act and subsequent anti-trust legislation. Section 5 of the Webb-Pomerene Act contains a provision under which concerns, by failing to furnish certain statements to the Federal Trade Commission, forfeit the right to benefit under Sections 2 and 3 of the Act, and in addition incur a penalty of \$100 per day. But this fine is recoverable in a civil suit by the Federal Government. In case an export association violates the provisions of Section 2 of the Act, which relate to restraint of trade, enhancing and de-

of opinion among the leading authorities on this subject. An eminent authority on international law, sums up the principal theories on this question as follows:¹ First, the so-called territorial theory of criminal jurisdiction asserts that a criminal statute is limited to the territory for which it was enacted and that any act committed in another country is beyond its influence; the second view holds that the criminal law of any state has jurisdiction not merely over the offenses committed there, but also over those committed by its citizens abroad; the third theory, which recognizes that all crimes committed in the country, and all crimes committed by natives abroad must be punished, proposes to extend criminal law still further, by laying down that the state has a right to protect itself and its subjects from injury, and is therefore privileged to visit any injury with punishment; a fourth view requires, primarily, that all crimes, even if committed abroad, should be punished.

England and America Adopt Middle Course.

Generally speaking, American and English authorities incline to the territorial theory of crime and concede extraterritorial force and power of the criminal law of a country only in particular places, e. g., barbarous and non-Christian lands, and as a matter of expediency in the case of offenses of a grave char-

pressing of prices, etc., and fails to readjust its business in compliance with recommendations by the Federal Trade Commission, that body is directed under the terms of Section 5 to refer its findings to the Attorney General of the United States for such action as he may deem proper. The Attorney General may then proceed against such recalcitrant association under the Sherman Anti-trust Act in a criminal prosecution or in a suit in equity.

In case the Federal Trade Commission should take action under the unfair competition clause of the Federal Trade Commission Act as extended by Section 4 of the Webb-Pomerene Law to acts done in export trade outside the territorial jurisdiction of the United States, the Commission may issue an order to cease and desist. If this order is not obeyed, the Commission may apply to a Circuit Court of Appeals of the United States for the enforcement of its order. Non-compliance with the mandate of the Circuit Court of Appeals would, of course, lead to criminal prosecution for contempt of court.

¹Bar: "International Law: Private and criminal," Boston, 1883, p. 626 ff.

acter such as murder. However, as a rule they have in mind extraterritorial jurisdiction over foreigners and not over nationals abroad. A leading exponent of this view holds that:¹

"The system of tying the entire criminal law of a country round the neck of a subject, and of making him liable to its operation, in whatever part of the world he may be, converts the criminal law into a personal statute, and puts it on the same footing as the law respecting civil status. Now the personal statute of one country, in civil matters, is recognized by another, so that there is no conflict of laws. But if the criminal law were a personal statute a foreigner would at the same time be subject to two criminal laws—the criminal law of his own state and that of the state of his domicile. No text writer and no state disputes the rule that all foreigners in a country are subject to its criminal law.

"The received rule as to the territoriality of criminal law rests on a sound basis. The territorial sovereign has the strongest interest, the greatest facilities and the most powerful instruments for repressing crimes, whether committed by native-born subjects or by domiciled aliens in his territory. But a sovereign government, which pursues its subjects into foreign countries, and keeps its criminal law suspended over them, attempts a task in which, even if undertaken with earnestness, it is sure to fail; but which will probably be performed in a careless, indifferent and intermitting manner. A government has no substantial interest in punishing crimes in the territory of another state; it has not on the spot officers of justice to discover and arrest the criminal; the transport of witnesses to a distance is a troublesome and costly operation; the difference of language, law and customs creates further impediments. A failure of justice, and an acquittal, is therefore likely to occur, even if the utmost diligence is used; but it may be assumed as certain that, unless some special motive exists, little diligence will be used. A government would feel, with respect to offences committed abroad in a civilized country, that it was, at the best, undertaking a work of supererogation; perhaps that it was interfering in a matter which, as the law of the place provided for it, would most properly be left alone. The experience of this and other coun-

¹Lewis, G. C. *Foreign jurisdiction*, London, 1859, p. 29 ff.

tries shows that a criminal law applicable to offenses committed in foreign lands (such as the act of 33 Hen. 8 and 9 Geo. 4) is for the most part a *brutum fulmen*, and that it is rarely carried into execution. The slumber of the law is therefore in practice a sufficient security to the native subject against its oppression. But if a government was to set to work vigorously to execute such a system of foreign criminal law as that which is embodied in the Austrian and Prussian codes, the sense of insecurity would infallibly lead to loud complaints, and the legislature would be urged into the adoption of a less ambitious course. Guilty men might occasionally be brought to justice; but innocent men, charged with the commission of crimes in distant parts of the world, would be almost incapable of defending themselves against the accusation and of proving their innocence. Even an educated person, provided with money and friends, might find it difficult to extricate himself from such a position; but a poor, uneducated, friendless man might be almost at the mercy of a false accuser. Such a law, if a government afforded funds and encouragement for its enforcement, might be a formidable weapon in the hands of unscrupulous malignity.

"It may, therefore, be laid down as a general principle, resting on grounds of the most enlarged expediency, that a criminal law ought to be local; that the sovereign ought to enforce it with respect to all crimes committed within its territory, and in national ships upon the high seas; but should not seek to apply it to crimes committed in the territory or ships of other civilized states."

Other Leading Authorities.

John Bassett Moore¹ states that "in the United States the territorial principle is the basis of criminal jurisprudence," and furthermore that:

"It has been constantly laid down by the Executive Department of the Government of the United States, as a rule of action, that the criminal jurisdiction of a nation is confined to acts committed upon its actual or constructive territory."

¹Moore, John Bassett. Report on extraterritorial crime and the Cutting case. Washington, G. P. O., 1887, pp. 56, 113.

Beale claims that:¹

"A sovereign exercises a personal jurisdiction based on law over his subject abroad. This personal jurisdiction is limited so long as the subject stays in the territory of a foreign sovereign to the forbidding of acts, or negative commands."

The well-known Dutch authority, J. Jitta,² in discussing the jurisdiction and territorial limits of the application of a national law says:

"The application of a national law is justified according to the principles, when a juridical relation belongs to the local sphere of social life, in which this national law is in force. Jurisdiction, on the other hand, is justified when the real elements of a juridical contest are so closely attached to a state, that the reasonable order of international social life requires the decisive rule for the solution of the said contest to be found and fixed by the judiciary of the said state."

The Institute of International Law at a meeting at Munich on September 7, 1883, adopted the following resolution:

"Art. 7. Each state reserves its right to extend its national penal law to acts committed by its citizens abroad."

No Complete Solution in Supreme Court Rulings.

The decisions of the Supreme Court of the United States furnish but meager material on this subject. Justice Story briefly touched the question,³ viz.:

"The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in

¹Beale, J. H. A treatise on the conflict of laws. 1916. p. 120.

²J. Jitta. The reconstruction of international law. The Hague, 1919, p. 77.

³The Apollon (1824, U. S.) 9 Wheat. 362, 370, 6 L. ed. 111.

construction, to places and persons, upon whom the legislature have authority and jurisdiction."

In *United States v. Nord Deutscher Lloyd*,¹ involving a violation of Section 19 of the Immigration Act of 1907,² Mr. Justice Lamar in delivering the opinion of the court said:

"The statute, of course, has no extraterritorial operation, and the defendant cannot be indicted here for what he did in a foreign country, *American Banana Co. v. United Fruit Co.*, 213 U. S. 347. But the parties in Germany could make a contract which would be of force in the United States. When, therefore, in Bremen, the alien paid and the defendant received the 150 rubles for a return passage, they created a condition which was operative in New York. If, in that city, the company had refused to honor the ticket, the alien could there have enforced his rights. In like manner, if by reason of facts occurring in New York, the statute operated to rescind the contract, the rights and duties of the parties could there be determined, and acts of commission or omission, which, as a result of the rescission, were there unlawful, could there be punished."

Substance of Foreign Laws Extending Jurisdiction.

In the following we shall indicate briefly some provisions embodied in the criminal laws of foreign states, as well as of our own country, which relate to offences committed by native subjects on the territory of foreign states.³

Generally speaking, the legislation of the United States and of Great Britain is reserved with respect to this species of foreign jurisdiction, while the laws of France, Austria and certain other states go much further in this direction. The law of England does not attempt to exercise a criminal jurisdiction with respect to large classes of offenses committed in foreign civilized countries, but there are certain acts committed abroad which fall within its scope. Upon an indictment for high treason, a

¹223 U. S. 517; see also p. 377.

²34 Stat. at L. 898, 904, c. 1134.

³See Foelix, J. J. G.: *Traite du droit international prive*. Paris, 1856, vol. 2, p. 261 ff.

Wharton, F.: *A treatise on the conflict of laws*. Rochester, 1905, 3rd. ed., p. 1604 ff.

charge of adhering to the king's enemies would be supported by evidence of acts done abroad. Treasons, misprisions of treasons or concealments, committed out of England, are to be tried¹ in like manner as if they had been committed in the shire where the trial takes place. If a man utters a forged instrument in England, which has been forged abroad, he is punishable under the statute.² In the case of homicide and bigamy the law of England attempts to exercise a local jurisdiction over the whole world and with regard to every class of British subjects.³ Under the Merchant Shipping Act of 1894,⁴ offenses committed by British subjects on board foreign vessels and by British seamen everywhere are punishable. British subjects in foreign countries are punishable under the Commissioners for Oaths Act⁵; and under the Slave Trade Act of 1843⁶ the British government claims jurisdiction over British subjects, wheresoever residing or being, whether within the dominions of the British crown or any foreign country, who do any acts in violation of the Slave Trade Act. Under special treaties with certain non-Christian nations, England also punishes crimes committed by British subjects in these countries.

English Court Asserts Extreme View.

English courts have made several very sweeping decisions respecting the extraterritorial force of British laws. In the case of *The Zollverein*⁷ the court held:

"The laws of Great Britain affect her subjects everywhere—foreigners only within her own jurisdiction."

Instances Where American Laws Operate Abroad.

With regard to the United States, we find a number of in-

¹Under 35 Hen. 8, ch. 2.

²24 & 25 Vict. ch. 98, sec. 40.

³24 & 25 Vict. ch. 100, sec. 9, sec. 57.

⁴57 & 58 Vict. ch. 60, sec. 686, sec. 687.

⁵1889, 52 & 53 Vict. ch. 10, sec. 9.

⁶6 & 7 Vict., ch. 98.

⁷(1857, Eng. Adm.) *Swabey*, p. 96. See also, *Rex. v. Sawyer* (1815, Exch.), 2 C. & K. 101.

stances in the Revised Statutes and in the Criminal Code of 1918 where extraterritorial criminal jurisdiction over American citizens is assumed. They relate to the transportation of explosives on vessels or vehicles carrying passengers between the United States and a foreign country;¹ judicial authority of American diplomatic and other representatives in certain non-Christian, uncivilized countries;² islands having guano deposits discovered by an American citizen;³ murder on the high seas;⁴ citizens voluntarily on board a foreign slave-trade vessel;⁵ treason;⁶ criminal correspondence with foreign governments;⁷ perjury or forgery committed in connection with an oath, affidavit or deposition administered or taken by an American secretary of legation and consular officer abroad, this being considered indictable extraterritorially.⁸

Numerous Countries Apply Extraterritorial Doctrine.

Criminal offenses committed by nationals in foreign territory are punishable also under the laws of France,⁹ Germany,¹⁰ Austria,¹¹ Belgium,¹² Italy,¹³ and numerous other states. Apparently the most comprehensive provisions for the punishment of crimes committed by nationals in foreign countries are contained in the Criminal Code of Japan.¹⁴ This code goes so far as to provide that:¹⁵

"Even though the case may have been adjudicated upon

¹Crim. Code, sec. 232.

²U. S. Rev. St., secs. 4083-4088.

³U. S. Rev. St., sec. 5576.

⁴Crim. Code, secs. 272, 273, 275.

⁵Crim. Code, sec. 252.

⁶Crim. Code, sec. 1.

⁷Crim. Code, sec. 5.

⁸U. S. Rev. St., sec. 1750.

⁹Code d'instruction criminelle, Art. 5 (law of February 26, 1910). See also Art. 24.

¹⁰Strafgesetzbuch, sec. 4, No. 3.

¹¹Strafgesetz, sec. 36 & sec. 235.

¹²Law of April 17, 1878, Art. 7.

¹³Codice penale, Art. 5.

¹⁴The criminal code of Japan. Translated from the original Japanese text by J. E. de Becker, * * * Yokohama, 1907. See Bk. 1, ch. 1, sec. 3.

¹⁵Ibid, sec. 5.

in a foreign country and a final and conclusive judgment rendered in respect to same, this shall be no bar to the institution of entirely new proceedings and the infliction of punishment for the same act (in Japan)."

In Certain Jurisdictions Degree of Crime Controls.

In some countries a distinction is made between a crime and a delit (corresponding in a general way to our misdemeanor). For example, according to the French law, just cited, a Frenchman may be prosecuted in France for a crime committed in a foreign territory, but for a delit, committed outside of France, he may be prosecuted in France only if the act is punishable by the legislation of the country where it was committed. The French Penal Code defines "crime" as an offense punishable with an infamous penalty (death, imprisonment, etc.), while a "delit" is an offense subject to correctional penalties (temporary imprisonment in a house of correction, fines, etc.). Under the German law cited above, a German who in a foreign country has committed an act defined as a crime or delit (*Verbrechen und Vergehen*) by the laws of the German Empire, is punishable provided the said act is punishable according to the laws of the place where it was committed. Under the Belgian law, mentioned above, a Belgian having committed a crime or a delit against a Belgian in a foreign country may be prosecuted in Belgium. Similar and in some cases slightly varying provisions are contained in the criminal law of Denmark, the Netherlands, Norway, Sweden, Switzerland, etc.

Export Trade Law Claims Extraterritorial Authority.

Considering, then, both the positive law and the views of the courts and legal authorities on this subject, it is apparent that American jurisprudence while inclined on the whole to the territorial view of crime, nevertheless contains a substantial number of instances which indicate that extraterritorial jurisdiction of criminal law over nationals in foreign territory is strongly asserted. Moreover, the enactment of Section 4 of the Webb-

Pomerene law can be said to constitute a further step in this direction. The tendency in continental European countries has on the whole inclined more towards the extraterritorial theory of criminal law. Broadly speaking, therefore, it can be said that this latter view is in the ascendency. The great changes wrought by the war in matters relating to international commerce and trade, the higher moral and legal standards which are even now crystallizing under our very eyes, lead us to assume that the future development of this phase of criminal jurisprudence will follow along these channels. Some of the economic provisions contained in the covenant of the League of Nations also point in the direction that the principle of extraterritorial jurisdiction will be asserted more generally in the future than in the past.¹

2.

UNFAIR COMPETITION IN FOREIGN TRADE.²

Statutory Provisions Enforcing Fair Trade Dealings.

We now come to the question as to what are "unfair methods of competition in export trade." Section 5 of the Federal Trade Commission Act does not define them but merely provides that "unfair methods of competition in commerce are hereby declared unlawful," and directs the Federal Trade Commission to prevent persons, partnerships and corporations, except banks and common carriers, from practicing such unfair methods. In Section 4 of the Export Trade Act the powers of the Federal Trade Commission are extended so as to embrace the suppression of unfair competition in export trade, even if such unfair methods are done outside the United States. In Sections 2 and 3 of the Clayton Act, price discriminations and so-called tying contracts, the effect of which may be to substantially lessen

¹See also pp. 241, 387.

²See "The Webb-Pomerene Law—Extraterritorial Scope of the Unfair Competition Clause," in *Yale Law Journal*, Nov., 1919, vol. 29, No. 1, pp. 29-45.

competition, or which tend to create a monopoly, are declared unlawful. Outside of these two practices declared unfair and unlawful by the Clayton Act the question of what is to be regarded as an unfair practice of competition is a matter for the Federal Trade Commission and the courts to decide. The Commission has thus far held certain practices to be unfair,¹ and it remains to be seen in how far it will be upheld by the courts in cases that may be appealed.

It should not be overlooked that many, but not all, of these unfair practices have been declared unlawful under the common law. The rapidly changing conditions in modern business life develop from time to time methods which are considered by common consent to be unfair, or *contra bonos mores*. The judicature relating to matters of unfair competition is consequently in a constant state of flux. The business-like and effective method of handling cases involving unfair competition under the procedure developed in connection with the Federal Trade Commission Act and the Clayton Act apparently has found general favor with business men, over against the cumbersome procedure formerly followed in connection with the old common law.

1 Square Deal Problem Concerns International Trade.

A number of practices which are held to be unfair are not unknown in the history of international trade, and it is more than likely that the passing off of goods, dumping, tying contracts, false and misleading labeling and advertising, trade libels, be-

¹The following list covers trade practices in connection with which the Commission has issued orders to cease and desist: false and misleading Advertising; urging refusal to accept Advertising; Bogus independents; Bribery; Commercial sabotage; exclusive agency Contracts; exclusive dealing (full line forcing) Contracts; Defamation and disparagement; Discounts; Dumping; bribery of Employees; enticement of Employees; Enticing customers; Espionage; false and misleading Labeling; License goods; Passing off of names; prosecution and persecution of alleged infringement; Misbranding; Misrepresentations; Monopoly; Passing off of infringers of Patents; Price-cutting by free goods and premiums; Price discrimination; combinations for Price enhancement; Price-fixing conditioned on non-use of competitor's goods; Rebates and discounts conditioned on exclusive dealing; Resale price-fixing; Selling certain goods at a loss and recouping on others; Tying contracts.

(See also Appendix, p. 549.)

trayal of business secrets (by banks, insurance companies, shipping concerns, commission agents, mercantile intelligence agencies, etc.), false indication of origin of merchandise, violation of contracts, bribery and similar objectionable practices will become a frequent source of complaints as competition in trade and commerce among the nations of the world increases.

Already Section 4 of the Export Trade Act has been invoked by the Federal Trade Commission in a formal complaint.¹ The complaint alleges that the company with the effect of acquiring for its product any undue preference which might be given by the purchasing public in Mexico to condensed milk manufactured in Europe, has during the past year adopted and used on its cans labels which mislead Mexican purchasers into believing that the milk is manufactured in Europe, and which wholly conceal the fact that the milk is manufactured in and shipped from the United States.

Another complaint of the Federal Trade Commission² related to

"unfair methods of competition in connection with the manufacture and sale of gold leaf by engaging in a concerted movement to unduly enhance the prices of gold leaf and to maintain such prices, through meetings, correspondence, etc., and by pooling their products and selling the same abroad at a less price than such products are being sold in the United States at the same time, assessments being made to cover losses on foreign sales when made below cost, the effect being to curtail supply, restrain competition and enhance prices."

Dumping Considered Unfair Competition.

In this connection it is worth calling attention to the anti-dumping clause of the law of September 8, 1916.³ Section 801 makes it a criminal act to import any article systematically into

¹Complaint issued in June, 1919, against Nestle's Food Co., Inc., New York. See Annual Report of the Federal Trade Commission, 1919, p. 81.

²Complaint No. 95 against the United States Gold Leaf Manufacturers Ass'n., etc. See Annual Report of the Federal Trade Commission, 1918, p. 65. See also Complaint No. 504, involving alleged sale of leather below sample in a foreign country.

³Title 8, Unfair Competition.

the United States at a price substantially less than actual market value abroad, plus certain charges, with the intention of destroying, injuring or preventing the establishment of an industry in the United States or of restraining or monopolizing the trade in the imported article. In addition to this prohibition of unfair price cutting, the law provides also against the practice known as "full line forcing." While the foregoing provisions relate to the import trade, they, together with the provisions of Section 5 of the Webb-Pomerene Law, indicate the consistent trend of our new foreign trade policy, which holds dumping,¹ whether in connection with import or export trade, to constitute unfair competition.

Advantages of a Licensing System Suggested.

However, in the course of commercial intercourse with foreign nations not a few cases of unfair practices arise from time to time which do not involve unfair competition, or regarding which it is very difficult to establish the element of competition. They constitute unfair trade practices rather than unfair practices of competition. It can be conceived very readily how American business, as such, is likely to be injured as the result of unscrupulous operations of individual wrong-doers. Ill-intentioned foreign competitors are likely to exploit cases of that kind to the disadvantage of American trade interests, all the more in the absence of adequate legal power on the part of our government to punish the commercial pirate and give redress to the foreign victim. Additional legislation, perhaps in the form of a compulsory licensing system for exporters, might prove a desirable means for safeguarding the good will of American export trade in this respect.

Jurisdiction Obtainable.

There is apparently no difficulty in getting jurisdiction over violators of the Webb-Pomerene Law, because the exporter

¹See above, p. 220.

(whether an individual or association) committing an act of unfair competition without the territorial jurisdiction of the United States would necessarily have his principal office or place of business located within the United States. In the case of an association, the location of its office, as well as the names and addresses of all its officers and stockholders or members must, under Section 5, be filed with the Federal Trade Commission.

Can Foreign Competitors Prosecute Infractors?

As stated above, the protection against unfair methods of competition effected outside of the United States under Section 4 of the Export Trade Act presumably extends to *American* competitors only. But sooner or later the question is likely to come up in a concrete form, whether *foreign* competitors can effectively invoke the power of the Federal Trade Commission in cases involving unfair competition in international trade.

INTERNATIONAL PROTECTION AGAINST UNFAIR COMPETITION.

In the circumstances it should be recalled that the United States is a signatory to the agreements of the International Union for the Protection of Industrial Property.¹ At its meetings,² the Union took action for the protection of patents, trade-marks, trade names and indications of origin of goods. In addition, the agreement reached at the Washington meeting embodies the following two clauses which provide for the suppression of unfair competition:

"The subjects or citizens of each of the contracting countries shall enjoy, in all other countries of the Union, with regard to patents of invention, models of utility, industrial designs or models, trade-marks, trade names, the statements of place of origin, *suppression of unfair competition*, the advantages which the respective laws now grant or may

¹Organized at Paris in 1883.

²Meetings were held at Paris in 1883; at Madrid in 1891; at Brussels in 1900; and at Washington in 1911.

hereafter grant to the citizens of that country. Consequently, they shall have the same protection as the latter and the same legal remedies against any infringements of their rights, provided they comply with the formalities and requirements imposed by the national laws of each state upon its own citizens. Any obligation of domicile or of establishment in the country where the protection is claimed shall not be imposed on the members of the Union."¹

"All the contracting countries agree to assure to the members of the Union an effective protection against unfair competition."²

The term "industrial property" as covered by the agreement of the International Union for the Protection of Industrial Property is defined by the terms of the covenant to mean industrial property in its broadest sense, extending to all production in the domain of agricultural industries, e. g., wines, grains, fruits, animals, etc., and extractives, e. g., minerals, mineral water, etc.

The Washington agreement was signed by the following countries: Germany, Austria, Hungary, Belgium, United States of Brazil, Cuba, Denmark, Dominican Republic, Spain, United States of America, France, Great Britain, Italy, Japan, United States of Mexico, Norway, Netherlands, Portugal, Servia, Sweden, Switzerland and Tunis. The United States has ratified the articles agreed to at the Washington conference, although it appears that up to the present time not all the signatories have done so.

Peace Treaty Conserves Fair Dealing.

Similar international agreements for the suppression of unfair competition have been entered into by foreign countries,³ but the United States is not a party to them, except in the matter of the present Peace Treaty of Versailles,⁴ which imposes upon Germany the obligation

¹Treaty Series, No. 579, art. 2.

²Ibid., art. 10.

³See "Export trade problems and an American foreign trade policy," in *The Journal of Political Economy*, vol. 26, p. 120.

⁴Art. 274-5. See also article on "New phases of unfair competition," etc., in *Yale Law Journal*, March, 1920.

"to protect the trade of the Allies against unfair competition, and, in particular, to suppress the use of false markings and indications of origin, and, on condition of reciprocity, to respect the laws and judicial decisions of Allied and Associated States in respect of regional appellations of wines and spirits."

Restricting Provision in German Statute.

In connection with the protection against unfair competition guaranteed by the agreement of the International Union for the Protection of Industrial Property it is worth calling attention to certain provisions in the French and German laws. Section 282 of the German law¹ for the suppression of unfair competition provides as follows:

"Whoever does not possess a principal place of business in the 'Inland' has a claim to the protection of this law only in so far as in the State in which his principal place of business is found, German manufacturers enjoy a corresponding protection, according to an announcement contained in the Imperial Gazette."²

This section was enacted prior to the Washington convention of the International Union for the Protection of Industrial Property, and apparently conflicts with the unfair competition clause of that covenant. According to Finger³ a conflict between domestic laws on the one side and foreign laws and international agreements on the other relative to unfair competition may take place under certain conditions. But Fuld⁴ holds that in such cases the rule applies "*Lex posterior derogat priori*."

Under French Laws Reciprocal Rights Required.

France has similar legislation. The French law relative to

¹Enacted June 7, 1909.

²The term "Inland" comprises the territory of the German Empire, the German protectorates, and the German consular circuits. Baer, *Das Gesetz gegen den unlauteren Wettbewerb*. Berlin, 1913, p. 399.

³Finger, *Chr. Reichsgesetze gegen den unlauteren Wettbewerb*. Berlin, 1910, p. 431.

⁴Fuld, *Ludwig. Das Reichsgesetz gegen den unlauteren Wettbewerb*. Hannover, 1910. p. 628.

trade-marks contains a provision¹ according to which foreigners are entitled to protection under that law provided the laws of the country where they are domiciled afford reciprocal protection.²

Another French law³ allows Frenchmen to invoke the more beneficial provisions of the agreement of the International Union for the Protection of Industrial Property. The law provides as follows:

"Frenchmen may * * * avail themselves to their benefit in France, Algiers and the French colonies of the provisions of the International Union for the Protection of Industrial Property signed at Paris on March 20, 1883, as well as the additional agreements and protocols amending said convention in every case where those provisions are more favorable than the French law for the protection of industrial property rights and especially in so far as regards priority and exploitation of patents."⁴

International Protective Agreement Enforced.

German as well as French courts have recognized the obligations imposed upon them under the agreement of the International Union for the Protection of Industrial Property. A leading case acted upon by the German Reichsgericht (Supreme Court) is *Eagle Oil Company of New York v. Vacuum Oil Company*.⁵ In this case the question came up whether a stock company which had its main establishment in the United States could invoke the protection of the German unfair competition law even though said stock company had no main establishment in the German Empire. The Reichsgericht answered this proposition in the affirmative and thereby took the position that a foreign competitor of a German concern can find relief against unfair

¹Enacted June 23, 1857.

²See Pouillet, Eugene. *Traite des marques de fabrique*. 6 ed., Paris, 1912. p. 478 ff.

³Journal officiel, July 4, 1906, 4538.

⁴Revue de droit international prive, v. 3 (1907), p. 114 ff.; see also v. 2 (1906), p. 121 ff.

⁵(1905). 60 Entscheidungen des Reichsgerichts in Zivilsachen, 217; (1897) 40 ibid., 61; (1900) 46 ibid., 125.

create trade commissions, and there seems to be a trend in that direction, a member or representative from each might be selected as a representative on the international body. Where an offense is alleged by business interests of one nation against those of another, the complaint would come through the trade commission of the nation whose citizens were complaining and be lodged with the international commission. The latter body could then, in order that there might be no charge of discrimination, have the cause tried by representatives of the international body not belonging to either one of the nations at issue. The international body should adopt a rule agreeing, after investigation and hearing, to publish its findings and dismiss the complaint, if the charge was groundless, or render its verdict to the trade commission of the nation against whose citizens the verdict was rendered.

"The publicity of such a proceeding should bring before the peoples of the several nations the real situation and would undoubtedly have a salutary effect in clarifying and stabilizing international opinions where a complaint was lodged unjustly or a wrong inflicted. In the event of the creation of such an international body, the same would only consider disputes over unfair methods of competition as between individuals or associations of different nations."

Time is Auspicious for Standardizing Trade Practices.

In concluding we wish to emphasize the fact that the enactment of Section 4 of the Webb-Pomerene Law represents an important milestone in the annals of American commercial legislation. It marks in a very auspicious manner the entry of the United States as the leading commercial power of the world.

To all appearances trade competition among the leading commercial countries of the world will in the future become much keener than it has been in the past. It is a well-known fact that in the past, in the wild scramble for trade, the standards of honest business were being disregarded more and more by all the various rival commercial nations. In the absence of any special regulations or legislation, it appeared as though a silent understanding prevailed in wide circles that export trade was subject to a code of business ethics widely at variance with the

rules observed in domestic trade. What was frowned upon as unethical and poor business policy, if not illegal, at home, was condoned and winked at or openly espoused when foreign markets formed the basis of operations and foreigners were the competitors. High-minded men of all nations have long observed with concern the growing tendency of modern international trade towards selfish exploitation, concession hunting, cut-throat competition and commercialistic practices of the most sordid type. Time and again in the course of years complaints have been voiced, retaliatory measures threatened, and more than once serious friction has ensued.

Now that the great war has quickened the public conscience the world over as never before with regard to the dangerous effects of commercial friction upon the political relations among nations, the time seems opportune for speeding efforts calculated to establish international trade upon definitely established principles of good faith. In these principles all law of commerce is rooted. In proportion as these principles shall be cultivated and developed in their inexhaustible and rich contents, the institutions of the law of commerce will prosper and give to commerce the humane imprint which shall always constitute the emblem of genuine civilization and enlightenment. On the other hand, false standards and objectionable trade practices will inevitably sap the lifeblood of commerce among nations.

Tentative Plan Promises Beneficent Results.

The whole subject discussed in the foregoing represents comparatively new ground. The efforts made up to the present time by individual states and by joint action among nations for the suppression of unfair competition in world trade are chiefly of a tentative character. However, the movement has been initiated successfully and it is to be hoped that out of it will develop a firmly established and workable machinery for promoting and safeguarding trade and commerce among the nations of the world.

3.

FILING OF PAPERS WITH THE FEDERAL TRADE COMMISSION.

Statutory Requirements Described.

Section 5 of the Act requires that export associations shall automatically file certain papers with the Federal Trade Commission. The Act distinguishes (1) between associations which were engaged solely in export trade at the time of the passage of the Act, and (2) between associations entered into subsequent to the passage of the Act. Associations coming under the first category were required to file papers within sixty days after the passage of the Act, which was approved on April 10, 1918. Regarding associations coming under the second category, the Act provides that every association entered into subsequent to April 10, 1918, which engages solely in export trade, shall, "within thirty days after its creation," file papers with the Federal Trade Commission. Presumably the words "after its creation" mean (1) in the case of an association which is a corporation, after the date of its incorporation, and (2), in the case of an unincorporated association, after the date of the contract of association.

As to the nature of the papers which under this section of the Act are required to be filed by associations a distinction is made between incorporated and unincorporated associations. Every association, whether a corporation or unincorporated must file "a verified written statement setting forth the location of its offices or places of business and the names and addresses of all of its officers and of all its stockholders or members." Moreover, if the association is a corporation, it must file a copy of its certificate or articles of incorporation and by-laws; while if the association is unincorporated, it must file a copy of its articles or contract of association.

Annual Report by Association.

The Act provides that a further report be made to the Federal Trade Commission on the first day of January of each year

thereafter. This report, according to Section 5, shall consist of a "statement of the location of the association's offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association."

For the convenience of those who desire to file the foregoing reports the Federal Trade Commission has prepared printed forms, which are available upon application. These forms (copies of which are printed on page 469, 473) are known respectively as "First Report from Export Associations," and as "Report from Export Associations."

Commission May Require Supplementary Information.

During the debates in Congress on the bill, as well as during the previous committee hearings, the need of close supervision of the activities of associations operating under the law was freely expressed. In order to safeguard against violations of the Act, Congress gave wide investigatory powers to the Federal Trade Commission. In Section 5 of the Act it is provided that every association shall furnish, in addition to the two reports mentioned above, "such information as the Commission may require as to its organization, business, conduct, practices, management and relation to other associations, corporations, partnerships and individuals." Under the terms of this provision the Federal Trade Commission is authorized to require export associations to furnish it such information as it may require both with respect to its own internal affairs as well as regarding relations with outside parties, such, for example, as foreign concerns.

Failure to Comply Involves Penalty.

Section 5 of the Act contains a penal provision. For failure on the part of an association to comply with the requirements of the Act regarding filing of papers and furnishing information to the Federal Trade Commission a twofold penalty is provided.

First, such delinquent association "shall not have the benefit of the provisions of Sections 2 and 3 of the Act," and second, "it shall also forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States."

FILING OF PAPERS BY "SIMPLE" CORPORATION
(NOT A COMBINATION).

Applicability of Provision to Individual Corporation.

Is a "simple" corporation (not a combination), which happens to be engaged solely in export trade, required to file its certificate or articles of incorporation and by-laws with the Federal Trade Commission under Section 5 of the Webb-Pomerene Act?

The following case may arise: The Pan-Caribbean Trading Corporation, a "simple" corporation, with charter powers to do a general import and export business, happens to be engaging or for a long time past to have been engaged solely in export trade. Must this corporation file papers under Section 5 of the Webb-Pomerene Act? It would seem that under the terms "every association which engages solely in export trade"—"and if a corporation," the Pan-Caribbean Trading Corporation would be obliged to file papers provided the words "and if a corporation" include a "simple" corporation. At the same time, however, the anomalous situation would arise that while said corporation would come under Section 5 it would not qualify nor benefit under Section 2 and 3 of the Act, because it is not under its charter organized solely for export trade. In Sections 2 and 3 the benefits of the Webb-Pomerene Act are extended to an association "*entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade*" (Section 2), and to "any corporation organized solely for the purpose of engaging in export trade" (Section 3). Therefore, the situation would be this, that the above-mentioned Pan-Caribbean Trading Corporation, with its charter powers authorizing it to engage in a general import and export business, would have

to file papers with the Federal Trade Commission and yet be not entitled to whatever benefits might accrue to it under Sections 2 and 3 of the Webb-Pomerene Act. A way out of the difficulty would be for that corporation to change its charter and to limit it solely to export trade. Presumably it would then qualify under Sections 2 and 3 of the Act, always on the supposition, of course, that the terms "association" and "corporation" in Section 5 contemplate "simple" corporations as well as combinations. In numerous instances formations of an ancillary corporation to operate solely in export business, may offer a simple plan.

On further analysis of the context of Section 5, however, it appears that the words "and if a corporation" form the first alternative kind of "association," as that term is used in Section 5. The second kind of "association" is mentioned immediately following with the words "and if unincorporated." In other words that part of Section 5 under discussion has in mind the twofold possible forms of organizations of an association, viz.: (1) the incorporated, (2) the unincorporated. Instead, however, of using an adjective in the first case (to-wit, "incorporated"), the words "if a corporation" are used, while in the second eventuality the adjective "unincorporated" is used. The grammatical context of the whole section, therefore, leads us to assume that the words "and if a corporation" in Section 5 do not contemplate a "simple" corporation, and that the term "association" is used in Section 5 just as in Section 1 of the Act as embracing a combination, a coming together of two or more separate (competing) entities.

Filing Papers by Individual Corporation Advisable.

In view of the fact that doubt seems to exist in the minds of some regarding the whole question, and as the Act provides a penalty of \$100 a day for failure to comply with the provisions of Section 5, and in the absence of any authoritative official ruling or construction of the points involved, it would seem advisable that concerns to which the above-mentioned circumstances apply should file papers with the Federal Trade Commission for their own protection until the whole matter is clarified.

POWER OF COMMISSION TO REJECT APPLICATION.

No Preliminary Approval Before Filing.

The question of whether the Federal Trade Commission under the terms of the Act has power to negative an application by an export association to operate under the law came up in the course of the debate in the House of Representatives on June 13, 1917.¹ Representative Morgan urged that the bill should be amended so that before associations could be formed and do business they would have to make an application to the Federal Trade Commission which would have the authority to grant that permission or refuse to grant it. The proposed amendment reads as follows:

"Provided, that before any association shall engage in business under this Act it shall secure from the Federal Trade Commission a permit to engage in such business, and the said Commission is authorized to issue such permits and may, in its discretion, refuse a permit to any association, and may, after hearing, cancel any permit issued."

Mr. Morgan contended that as the bill read, without the proposed amendment, companies would have absolute authority to unite, there being no authority vested in any agency of the government to refuse a permit to any export combine.

The proposed amendment was objected to chiefly on the grounds that such autocratic power, as would be provided for under its terms, should not be vested in any commission of the Government; that a commission might be prejudiced against some line of industry and prevent it from doing what others were permitted to do; and that no commission should have the power to determine who shall do business in the export trade.

In answer to the statement that under the provisions of the bill an association could not be prevented from filing its agreements, etc., and that once an objectionable association had registered there was no effective means of weeding it out—Representative Webb,² the author of the bill, called attention to the provision of Section 5 which requires that an association shall furnish

¹Congressional Record, June 13, 1917, p. 3853, fol.

²Id. c. p. 3854.

to the Federal Trade Commission such information as the Commission may require as to its organization, business, conduct, practices, management and relation to other associations, corporations, partnerships and individuals and that in case of failure to do so, an association shall forfeit the benefits of Sections 2 and 3 of the Act, and become liable both under the Federal Trade Commission Law and the Sherman Anti-trust Law.

The proposed amendment was voted down by a vote of 131 to 11.

CHAPTER XV.

Methods of Forming Export Associations.

The problem of putting together an export association that may be serviceable and workable in export trade, that shall meet the requirements of the law and shall constitute a smooth functioning central agency for co-operation by its participating members, is not a simple matter by any means. It involves, in the first place, a careful study of the possibilities, needs and prospects of the domestic and the foreign market situation of the particular industry, and of competitive conditions in international trade. Special legal and economic problems must be solved in order to reach an agreement upon contractual relations that will be mutually profitable as well as strictly enforceable. To meet these prerequisites several types of association have been worked out in this country and abroad. The details of organization, of course, show an almost infinite variety of schemes and agreements corresponding to the requirements of each individual case. At the Fourth National Foreign Trade Convention of the National Foreign Trade Council, held at Pittsburg in January, 1917, a special committee, composed of practical business men, submitted a report on "Suggested Methods of Co-operation in Foreign Trade."

Valuable Trade Council Report.

So many valuable suggestions are contained in that report that we reprint the same herewith in full, pages 255 to 279. The reader should note, however, that a number of propositions outlined in the report are not in agreement with some of the provisions of the Webb-Pomerene Act, as interpreted by the authors of this book in Chapters XII-XIV. It appears doubtful whether several of the suggestions made in the report if followed in a

concrete case would pass muster under a strict interpretation of the terms of the law, so that due caution should be exercised in applying the otherwise admirable suggestions of the report. Additional suggestions as to how different types of selling organizations may obtain the benefits of the Webb-Pomerene Law will be found in the Proceedings of the Ninth Annual Convention of the American Manufacturers' Export Association held at New York on October 30 and 31, 1918, pages 298-315. See also Exhibits 16, 17 and 18 of this book.

COMMITTEE'S REPORT.

SUGGESTED METHODS OF CO-OPERATION IN FOREIGN TRADE.¹

The purpose of the plan submitted herewith is to outline methods by which groups of co-operating manufacturers can, in one form or another, sell their products abroad at a minimum of expense and investment with a maximum of results. Many large factories will be interested primarily in selling to existing foreign houses or consumers; others will find it advisable to gradually establish local agencies and branch houses abroad.

It is generally believed that the smaller manufacturers can be better represented by the establishment of American selling houses in the foreign field—these houses to carry the necessary stocks of merchandise for immediate delivery.

The problems of our manufacturers, while numerous, may be confined exclusively to export in full compliance with the provisions of the Webb Bill, as introduced in the House of Representatives, with all its safeguards against illegal restraint of domestic commerce and unfair methods of competition. The variety of the suggestions is necessitated by the variety of conditions and competition abroad.

PLANS FOR ORGANIZATION OF CO-OPERATIVE SELLING COMPANIES ABROAD.

(1) A Group of Large Manufacturers, Closely Identified Making Kindred but Generally Non-competing Products.

¹Fourth National Foreign Trade Convention. Official Report, 1917. pp. 265-286. (Reprinted with the kind permission of the National Foreign Trade Council.)

(2) A Group of Manufacturers Controlled by One Company Making Kindred and Non-competing Products.

(3) A Large Group of Small Manufacturers, Each Entirely Independent, Whose Products Are Allied and Which May Be Both Competing and Non-competing.

(4) A Group of Manufacturers Making Similar and Generally Competing Products, Who Co-operate with One Selling Organization on a Commission Basis.

(5) A Group of Producers of Raw Materials, Who United in One General Selling Agency for the Disposition of Their Export Products.

I.

HOW TO ORGANIZE A CO-OPERATIVE FOREIGN SELLING ASSOCIATION UNDER THE WEBB BILL, FOR THE SALE OF KINDRED, BUT GENERALLY NON-COMPETING PRODUCTS.

1. The kind of organization most likely to secure efficient operation of such an association would necessarily depend, to a large extent, upon the nature of the products to be sold, the countries in which it is desired to make sales, and the scope of the association. Methods and organization suitable for marketing products such as, for instance, hardware, notions, household utensils, drugs or imitation jewelry, might be very inadequate for handling business in steel products, railway cars or locomotives, machine tools, cement or lumber. The modes of doing business and conditions vary very considerably in the different foreign countries and methods which might be thoroughly successful in English speaking countries, such as Australia or New Zealand, might be ineffective in South America, China or in many of the countries of continental Europe. Consequently, before any permanent organization could be effected, it would be necessary to form a preliminary organization to obtain information and data necessary to determine the form and scope of the permanent organization.

2. This preliminary organization should obtain from each

manufacturer proposing to become a member of the permanent organization, definite statements as to the following:

(a) The nature of the products he desires to export; and whether or not he has hitherto done any export business, and if so, to what extent and with what countries; if his products have not yet been exported, or only to an insignificant extent, what reasons exist for believing that a demand for similar products exists, or can be developed, in foreign countries, and whether, in such case, he is prepared to accept orders at such prices as may be necessary to compete in those markets.

(b) What sum he is prepared to expend annually, either for propaganda work, or in the negotiation and securing of export orders.

(c) Over what period of years he would be willing to expend such sum in order to enable a thorough demonstration of the possibility of marketing his products abroad upon terms satisfactory to him.

(d) What minimum production per annum he would be willing to devote to the building up of a continuous export trade, such minimum production to be reserved for the filling of export orders, provided they can be secured, regardless of the temporary exigencies of domestic demand.

(e) Whether he is prepared to sell for cash only, or for credit, and in the latter case, what credit risks in general he is prepared to assume and whether he is willing to allow the central organization to determine credit risks for his account, or for its own account.

(f) Whether he would be prepared to allow the selling organization to be an autonomous body, dealing with the buyers as a principal (not merely as agent for the manufacturer), and having full control over every detail of marketing and delivering the goods for export from the time the material leaves the mill, but, generally speaking, exercising no control over the manufacture, except to the extent that the foreign buyer's requirements as to manufacture and packing would have to be complied with by the manufacturer strictly in accordance with the orders of the selling organization, provided always that the sell-

ing organization should previously have submitted to the manufacturer and obtained his approval of such manufacturing requirements and packing.

3. After preliminary articles of agreement, covering the foregoing and other principles of a mutually protective nature, shall have been arranged, it is suggested that the amount of cash which each of the manufacturers proposing to form the association is willing to expend annually, be contributed to a general fund, to form all or a portion of the paid-up capital of the composite selling organization, and that shares be issued to each manufacturer in proportion to his contribution. If the number of such manufacturers be ten, or less, each of them should thereupon be entitled to one or more directors, in proportion to his subscription, as might be agreed upon, and such directors should elect the officers of the selling company in accordance with the usual corporation practice. Should the number of manufacturers exceed ten, one director might represent two or more of them, as might be agreed upon, in order to avoid making the board of directors too large. Except for such supervision as might be given in the usual way by these directors representing the manufacturers, the selling organization should be autonomous, as above defined, subject only to instructions from each manufacturer as to his ability to manufacture, the extent to which he is prepared to accept orders for export and the minimum prices at which such orders would be acceptable. It is suggested that where a manufacturer's product—although of kindred nature—may, nevertheless, differ in detail from other products handled by the selling organization, to such an extent that separate representation is necessary, each of such manufacturers might appoint a special representative in the selling company to be employed in connection with his products, but who should, nevertheless, be subject only to the direction and control of the selling company from whom he would receive his remuneration. These special representatives, possessing, as they would, special knowledge of the particular product of the manufacturers by whom they would be nominated, would be available for training or educating agents for the foreign field,

and for conducting special correspondence relating to their respective products, while assisting in other branches, for which they may possess the necessary qualifications and in the general business of the company.

4. Under this suggested plan, any and all existing foreign agencies of the constituent manufacturers would come under the jurisdiction of the joint selling company, which should have full power to consolidate agencies operating in the same territory and to discontinue duplicate, conflicting, or, in its opinion, unnecessary agencies.

5. As all the stock in the proposed company would be held by the constituent manufacturers, all profits over and above the expenses of the selling company would accrue to the shareholders and should be paid annually in dividends, or allowed to accumulate in the reserve fund, suggested elsewhere in this paper, and any excess of expenses, or losses, should be provided for annually by an assessment pro-rata, on the constituent manufacturers, in proportion to the f. o. b. mill value of the business secured for each of them.

6. In order to provide for the normal operating expenses of the selling company, including the liberal remuneration necessary to induce competent men to go abroad and stay for a period of years, as well as an adequate reserve fund for contingencies, such an exploitation work, taxation, war risk insurance when incurred, opening new branches, etc., and particularly for credit risks, it is suggested that a commission sufficient for these purposes be allowed the selling company by the constituent manufacturers on all sales effected, such commission to be readjusted annually in view of the actual expenditure during the past year and the probable requirements of the programme of operations for the ensuing year.

7. *Credit Risks:* It is desirable that as soon as possible, the selling company should undertake its own normal credit risks, except in cases where the magnitude of a contract and consequent credit risk involved is such that the capital of the selling company would not normally justify the risk. In such cases, the selling company would ascertain whether the manufacturer

of the particular goods involved would be willing to assume the credit risk himself, or would only consider the contract on some other basis, in which latter case, unless the selling company could arrange otherwise satisfactory and safe terms of credit, the business would necessarily have to be declined. The necessity for autonomy with respect to credit risks is patent for many reasons, chief among which is the desirability of empowering the selling company, either through the home office or through its foreign branches, to make immediate decisions by cable as to credit risks, in the case of any proposed transaction.

8. It is, therefore, suggested that the amount which each manufacturer may be willing to contribute as his normal annual expenditure for export trade or as represented by the shares in the selling company which he takes, should be contributed annually for a period of years, without taking out any dividends from the profits, if any, of the selling company, the manufacturer to be satisfied with his manufacturing profit after deduction of the commission allowed the selling company, thus allowing any profits of the latter to accumulate for a period of years in order to provide for the objects above mentioned, and particularly for credit risks and possible bad debts. Foreign business in very many products can only be developed to any important extent by extending such liberal terms as will become feasible only by means of the establishment or accumulation of an adequate reserve fund, unless the manufacturer is willing to assume the risks.

9. The selling company having been formed, it would be impracticable, in this general report, to detail concisely its form of management. In some companies which are doing a large export business, the selling organization is divided with respect to certain classified lines of manufacture which are exploited by respective departments possessing special knowledge of the particular lines. In others, it has been found preferable to divide the foreign territories or countries to be exploited into suitable zones, each in charge of a separate department; and in still others it has been found advisable to operate on the lines of both the zone and commodity plans, one department supplementing

the work of the other, the commodity departments possessing the necessary knowledge of the goods and the conditions of their manufacture, while the zone departments have equally necessary knowledge of the countries to which the goods are to be exported.

10. *Conditions of Sale:* At the very inception of the organization it is essential that certain conditions of sale, covering the accepted practice in export trade with respect to the products to be exploited, should be laid down, and that from these conditions there should not be permitted any deviation by the company or by any of its agents in selling to any buyer. Every transaction should be based on these conditions and quotations should be made and orders accepted only in exact accordance therewith.

By this means it would be possible to minimize claims, to avoid controversies with customers, and to establish cordial relations with them. These conditions of sale should be translated into and be printed in the language of every country in which sales are to be made, and used whenever negotiations are conducted in any such language. When desired, contracts might be executed in duplicate, i. e., both in English and in the language of the country in which the sale is made. It is most desirable, however, that such conditions of sale should be translated by natives of the respective countries, familiar with the nomenclature and exact significance of the terms of the local language, and that the translations should then be carefully checked by one or more others, equally skilled, as it will be found that there is considerable diversity of opinion as to the proper equivalents of expressions used in each of the respective countries, and as to the meaning in the various foreign languages of numerous English words.

11. Suitable facilities should be afforded, without delay, to the selling company to enable it to issue, under its own name,—or where it is desirable on account of a product being best known by the name of its manufacturer, jointly under the names of the manufacturer and the selling company,—an adequate supply of advertising matter, pamphlets, catalogues, etc., relating to the products to be exploited. When possible, it is de-

sirable that full information, as to kindred products, modes of packing, etc., should be given in a joint catalogue, to be published, whenever feasible, in the languages of the respective countries to be exploited. All necessary data and printed information should be furnished by the respective manufacturers to the selling company, free of expense, or at a normal charge, together with all necessary samples, price lists, etc., but the cost of issuing a joint catalogue, as also any other joint selling expense, should properly be chargeable to the selling company, unless, under special circumstances, it should be considered advisable for the respective manufacturers to contribute.

12. In most cases, it is advisable that the selling company should be informed by the manufacturers as to the exact manufacturing cost of the article to be sold and authority given to meet any competition encountered, down to the limit of the manufacturing cost; at all events, this should be done in the early stages of the exploitation. The control of the selling company by directors representing the manufacturers, and the fact that the selling company would not be organized for profit to itself but only as a means of providing manufacturing profits, would, in most cases, prevent any abuse of this information. If, however, it should be deemed inadvisable to disclose the manufacturing costs to the selling company, minimum selling prices, based upon costs and market conditions, should be established from time to time, good until changed with reasonable notice of such change, and the selling company should have authority to go down to these limits whenever necessary in its judgment. The only exceptions to these rules should be when the product is of so complicated a character that the cost can only be computed by the manufacturer on receipt of full details of each respective inquiry; and in such cases, full details should be furnished by the selling company to the manufacturer who in turn should advise (as might be agreed upon at the inception of the organization) either his cost of manufacture or minimum selling price, together with any useful suggestions as to domestic selling prices, and, (provided he possesses such information) as to the possible prices obtainable for export.

13. The selling company should have full power to appoint all foreign agents without interference from the manufacturers other than the control of the board of directors, except in special cases where an individual manufacturer may desire special representation for his own particular product; in such cases it should be a matter for agreement as to the personality of the agent and his remuneration, traveling and other expenses. With such exceptions the selling company should pay its entire operating expenses, including salaries, rents, traveling, cable and telegraph expenses, taxes, and bad debts as above defined; and, as previously indicated, its remuneration on a commission or percentage basis should be sufficient to enable it to undertake all such expenses. It may be necessary, at least at first, to limit the amount of such expenses and, consequently, the scope of the selling company's operations, to the total of the amounts the various constituent manufacturers are willing to contribute annually for the promotion of the export business, or, in cases where an export trade already exists, to the amount the respective manufacturers have hitherto expended annually thereon. In appointing foreign representatives, it is important, not only to secure competent and reliable men, but to make it worth their while to devote their best energies to the development of the company's business and to the protection of its interests; and it is believed that this can best be attained by paying a moderate minimum salary, plus a special annual remuneration based upon the success achieved. In many foreign countries it is customary to give such annual bonuses to faithful employees at the end of the year. It should, furthermore be understood, without, however, making a definite contract, that they would be expected to remain abroad for a stipulated term of years, provided their efforts give satisfaction to the company, failing which, their services would be dispensed with. In selecting men to serve as representatives in foreign countries due consideration should be given, not only to their personality and general business ability, but also to the extent to which they possess the undermentioned qualifications:

1. Familiarity with the products to be sold.

2. Knowledge of the country to which they are to be assigned, and of the language spoken there.

3. Acquaintance with customers in the territory to which they are to be assigned.

In general, it is believed that an American company, selling American products, will obtain the best results by employing Americans as representatives. Other employees of the foreign offices, or sub-agents reporting to the principal local representative, may frequently with advantage be natives of the country or men of other nationality, possessing the necessary qualifications, such as acquaintance with the commodities, or with the buyers whose trade it is desired to secure.

14. The selling company should have autonomous control of the distribution of orders to the respective constituent manufacturers, where there are more than one manufacturing the product in question. The control of the Board of Directors will be sufficient to prevent any favoritism or discrimination, and as the organization will be a mutual profit-sharing company, no difficulties should be encountered on this score. The selling company will naturally endeavor to dispose of the surplus product of each constituent manufacturer to the limit of his manufacturing ability, and when this limit has been reached, in the case of any manufacturer the selling company will naturally devote its energies more especially to the products of the others. Should the constituent manufacturers be unable to supply the demand developed by the selling company, it may be found feasible and advantageous to admit other manufacturers to the organization, or to handle special lines for manufacturers who are not constituents of the selling company, as a means of increasing the profits and of reducing the share of the expenses to be borne by the constituent manufacturers.

15. Among the advantages to be derived from a joint selling organization, as compared with the independent handling by each manufacturer of export business, is greater and more accurate information as to the credit and financial standing of foreign buyers, and the ability to secure ocean transportation to best advantage. In addition to a competent invoicing and ac-

counting department, the selling company should install at the very outset of its operations, credit and transportation departments in charge of competent men experienced in such matters. The credit department should collect, from all available sources, the fullest information as to the financial standing, resources and character of every actual or prospective customer in the various foreign countries, keeping such information, by means of card indexes or other effective systems, so as to be immediately available when occasion for its use arises. The transportation or traffic department should include men conversant with ocean freight matters and marine insurance, and competent to prepare, in a proper manner, ocean bills of lading, consular invoices (in accordance with the requirements and in the languages of the respective countries of destination) and experienced in all other matters pertaining to the proper and efficient handling of shipments to foreign countries. As the volume of freight handled by the selling company would increase in importance, the ability of the selling company to secure favorable freight rates from steamship owners, thereby enabling competition with European manufacturers, would increase. It has been necessary, in the case of some of the largest American organizations now engaged in the export trade, to establish their own steamship services with steamers owned, or chartered, for the purpose, in order to obtain such freight rates as would place them on an equality with their European competitors. These are of course exceptional organizations, and while the volume of business to be handled by such an organization as we are now discussing might be too small to justify the chartering or purchase of steamers, the advantage of collective bargaining with steamship owners, or agents, which would be afforded by the concentration in the traffic department of the selling company of the export tonnage of all the constituent manufacturers, is obvious.

16. Another necessary feature of the joint selling organization would be a committee for dealing with claims. In foreign, as in domestic trade, claims will undoubtedly arise from time to time, and the dealing with such claims in a manner equitable to the foreign customer, without sacrificing the just rights of

the manufacturer, is necessary for the building up of that good will which is essential to the growth of a large business, which in the case of international business, and particularly with far distant countries, necessarily involves faith in the justice and honor of the seller equally with that of the buyer. It is, therefore, necessary that the claim committee be composed of men conversant not only with the particular products forming the subject of a claim, but with transportation conditions and with business principles generally.

II.

PLAN FOR CO-OPERATIVE ORGANIZATION OF A LIMITED GROUP OF MANUFACTURERS HANDLING KINDRED BUT NON-COMPETING PRODUCTS AND WHOSE GOODS ARE IN SUBSTANTIAL DEMAND.

The problem presented does not differ materially from that of a single large corporation composed of a number of smaller units, each of which manufactures products, which, while similar in that they use the same raw material, differ in the products made which are non-competing, as for example, a large steel company which manufactures, say, rails, structural shapes, merchant bars, tin plate, wire and the like; or a rubber company which manufactures foot-wear, automobile tires, mechanical or technical goods, hard rubber, clothing and the like. For the purposes of this report, therefore, the subject under the sub-heading above, may be treated quite aside from the question as to whether the individual manufacturing units are entirely separate or controlled by a single holding company.

The problem itself is simple in the things to be accomplished aside from the complications that may present themselves in the actual work of accomplishing it, for, after all, the problem is one of merchandising only and all other questions become details of expediency in accomplishing the desired result.

The first question which presents itself is as to whether the organization is to operate so as to produce a profit for itself, no matter what becomes of that profit, or whether it is to operate

so that all profit shall immediately and automatically accrue to the manufacturing company. It is believed that the latter plan is the best, for, after all, the organization, no matter how complicated, is in reality a salesman and the same fundamental rules under which a salesman operates should control the company. A salesman is entitled to a fair and proper compensation for his efforts and to his legitimate expenses. This compensation may be in the form of a fixed sum or may be directly dependent upon the sales or profits that he makes. It is therefore proposed that the merchandising organization should purchase its goods from the manufacturing units at the same price which it in turn sells them for. The fixing of this price is another matter and does not affect the propriety of making the selling price and the purchasing price the same. It is obvious that the existing domestic price can have nothing to do with the proper selling price for distribution in foreign fields; the local market and the conditions of competition existing therein must alone determine the price at which local sales can be successfully made, but the foreign sales price should be the same as that at which the selling company purchases from the manufacturing company; therefore, the manufacturer will receive the profit in the price at which it invoices the goods to the selling company.

It is presumed that the basis of operation will be that of purchase and sale by the merchandising company from the manufacturing company, and not any other. This part of the plan having been agreed upon, many details present themselves for disposal. The first, of course, is the question of the expense of operation of the merchandising company,—the compensation of its officers and field men, both at home and abroad. It is entitled to its legitimate operating expenses outside of the question of compensation, such as rents, light, heat and the like. It is entitled to a proper compensation for its personnel and it is believed that this compensation should be fixed in two ways, first on the basis of straight salary or wage, and second, on the basis of some form of participation in the success of the business. The best and in fact the only feasible method for such a participation would appear to be a legitimate percentage of the

net profits of operation as received by the manufacturing company. The manufacturing companies, receiving the total receipts arising from sales, together with the profits contained therein, must of course contribute from these profits the necessary amounts to pay all of the expenses of operation, including compensation. This can very easily be provided for by assessing against each manufacturing company its proper share on the basis of the volume of business transacted for it. The principal reason, it is believed, that all of the profits should accrue directly to the manufacturing company is that it disposes at once of any questions or controversies as to proper prices and as to a reasonable distribution of the profits. For example, if a concession is necessary in order to make certain sales in certain territories, the question would at once arise, upon request being made for this concession, as to whether it was necessary in order to meet the market conditions or as to whether it might not have been requested so as to show a greater margin of profit for the merchandising company. If it is clearly understood that the merchandising company acts solely in the capacity of a salesman and that it has no direct interest in the profits, then there can be no question as to the proper distribution of the profits.

The second feature of the problem is the matter of credit liability. The determination of credits should rest entirely with the merchandising organizations, but the credit risk or liability should rest with the manufacturing units. If losses are sustained, they should be chargeable to the manufacturing unit whose goods are involved; in other words, the manufacturing unit receiving all of the profits must assume all the risks. It will be found in perfecting an organization such as is proposed and operating it, that there will be points where exception to the general plan must be made and where the plan cannot be carried out inflexibly. For example,—in the question of disposition of profit, it is impossible to return all the profit as it is acquired from all sales from local stocks where the goods involved are of such nature as to be dependent upon a rapidly or widely fluctuating market. The stocks of goods being purchased from the manufacturing companies for shipment to various branches

must, of course, be invoiced at some fixed and agreed upon price; the sale of these goods, however, will not always be at a fixed price, some sales taking a higher price than others. It is impossible to avoid, therefore, some profit arising from the sale of local stocks, but this profit can well be taken care of by applying it to the expense account and reducing it by the amount of profit obtained. If the amount exceeds the total expense account, then the residue or surplus profit can be distributed pro-rata as an extra dividend. It is thought, however, that this feature of the problem will not be particularly vexatious as the amount of surplus profit arising after the expense account has been entirely absorbed is not likely to be large.

As to the organization itself, there should be a principal office located in New York to be in charge of the chief executive of the company. The sub-organization of the head office should be on the basis of products; that is, a department handling each product regardless of the factory of origin. This is believed to be better than a series of geographical departments because the head of each department should be an expert in the line of goods that he is handling and one who could easily handle the problems involved in the sale of those goods, whether they arise in one part of the world or another. This feature is believed to be important; and it is again emphasized that the departmental sub-divisions should be on the basis of products rather than geographical.

There should also be an accounting department which can properly combine credit. Financing, as meaning the borrowing of money, is not a part of the contemplated plan, as the company should be so capitalized as to provide adequate working capital. If more is needed it should be obtained from the principals rather than from outside. The capital may be large or small. If it is large it should be such as to permit the discounting of all bills and the prompt payment of all obligations, the funds coming from the capital itself. If small, the company may be financed by its composing manufacturing members on the basis of payment of invoices rendered, as may be possible or convenient. It is thought that better satisfaction would result if

the company was adequately capitalized so as to pay its obligations promptly. There should also be a well-organized traffic department, the three sub-divisions being sufficient; that is, traffic, accounting and credit and sales; the sales to be of course sub-divided as outlined.

7. The organization in the field is comparatively simple. A branch manager, supported by assistants as may be necessary, the assistants to consist of an accounting department and a force of salesmen. Beginnings should be modest; and it is believed that, except in certain specified commodities, local stocks should follow preliminary work, the preliminary work to consist in making as many sales as possible without a local stock and then to supplement this work by adding a local stock and increasing it from time to time as may appear justifiable. In attacking any given territory the manager should proceed to the principal city and take a modest office and hire a stenographer, an office boy and one or more salesmen, but he should himself be a producer; that is, he should be a salesman and, presumably, the salesman making the greatest number of sales. The principal thing is to get someone into the territory actively working; and then to supplement and build on that nucleus as conditions warrant. Local stocks should be added as soon as it can be shown to be necessary and the premises correspondingly enlarged.

It is believed that an organization such as is outlined is in the truest and broadest sense co-operative. Reverting to the question of profit, it is believed that if the merchandising organization seeks to make substantial profits it becomes non-co-operative to that extent. From the standpoint of the manufacturer it is believed that better satisfaction will result if the returns come speedily in the shape of price. If it is planned to capitalize the company adequately, then stock should be issued and subscribed for by the manufacturing companies. This stock should be non-dividend paying, the presumption being that the company could liquidate or sell at any time so that the value of the capital should not be impaired. The capital required would be only such as should be necessary for the purchase of

goods. Accounts payable and accounts receivable should at all times be such as to leave unquestioned the solvency of the company.

The Board of Directors should be composed of one or more representatives from each manufacturing company, together with the chief executive of the merchandising company. The executive himself must be of such caliber as to warrant and merit the widest latitude in the management of the company and the greatest authority in planning and executing his plans. The sole purpose of the Board of Directors should be to satisfy the manufacturing companies, who are in reality the owners of the business, as to its proper conduct.

The particular subject to be treated deals only with the organization itself. It may not be out of place, however, to indicate some things which the manufacturing companies must be prepared to carry out. They must, in the first place, be prepared to set aside a given percentage of their product for export. This must be inviolable. There must be no thought of dumping; there must be no question of taking orders when wanted and refusing them when not wanted, or any policy which renders the source of supply questionable or fluctuating. It may be as small or as large as the manufacturer chooses, but when once fixed it must not be disturbed, for stability and continuity are most important in foreign trade.

The manufacturer must also be flexible in the matter of price and in the matter of detail in the execution of orders. He should know what the export business means. He should know the delicacy and sensitiveness of it; and if not prepared to support it, should not enter the field. He should realize that volume is the best asset of an export business and that if at times little direct profit is shown in any sale or transaction, there is a very strong indirect benefit in the contribution towards overhead and the general stabilizing effect of orders which originate from such a wide field of activity.

III.

SUGGESTIONS FOR ORGANIZING A CO-OPERATIVE FOREIGN SELLING
COMPANY FOR THE SALE OF COMPETING AND NON-
COMPETING PRODUCTS.

The purpose of this plan is essentially to aid the smaller manufacturers to sell their commodities in the foreign field, and in this class must be included certain relatively large manufacturers who have only a limited surplus available for export or whose products are in only limited demand abroad. It is believed that the problem of these manufacturers is largely on merchandising lines. The selling organization, to be successful, should gradually establish branch houses carrying sufficient stocks of merchandise and having an adequate administrative and sales force.

It is advisable that such an organization should have a main or head office on the seaboard.

It may safely be assumed that such a selling organization must necessarily represent a rather large number of factories. It should, so far as possible, handle kindred or allied lines which may generally be non-competing but which may also, to an extent, be competing. It will be recognized that on certain commodities of general use, one factory cannot well supply the entire demand and that the co-operation of a competing factory or factories will give the selling organization the necessary tonnage or quantity to its advantage and also give the factories an export outlet without interfering with their domestic business. Other factories, even though able to supply the demand, can operate more economically through one selling organization if the demand for their products is only reasonably large.

Because of the large number of products which may be needed to round out a comprehensive line for the merchandising or selling house, it would seem difficult to arrange the business on a percentage or expense basis. The various products would necessarily carry varied gross profits and selling expense, as well as entirely different credit terms. As an example, sales of

machinery are very generally made on long time and involve one sale, while goods which are immediately used or consumed are sold on relatively short time. The cost of selling a large item of machinery is proportionately much less than an equal amount of consumable merchandise sold to a considerable number of buyers. Credit is an expense, just as selling is, and must be so considered. The payment of a commission on all sales naturally results in encouraging the selling organization to work particularly on the large sales and to neglect smaller ones. It is frequently good merchandising policy to make small sales with little or no profit for the ultimate benefits which may result; and this is encouraged if the selling organization has a general broad merchandising policy which permits it to make a profit. Every possible encouragement should be given the selling organization to develop a large permanent business, and not to concentrate on individual transactions.

It is suggested that manufacturers in determining their selling price for export, eliminate their overhead charges on domestic business. It is also suggested that on keenly competing lines of which a considerable surplus is available for export, that the manufacturer look to the returns on his investment in the selling organizations for a portion at least of his profit. It is of first importance that strong, capable American selling houses be established abroad. Their success means ultimate profit to the manufacturer and assures a permanent increase in our export business.

As a matter of convenience and efficiency in organizing a foreign selling company which is to represent a large number of manufacturers, it would be well to have the plan originate with or be supported by two or three comparatively large factories which can afford some immediate expenditure of time and money and which will command confidence among those who may become interested. These concerns should appoint one man to study and handle preliminary details until a meeting of all interested can be called or an actual organization perfected. It is suggested that the following points be considered and put into effect where possible:

(1) The individual or committee in charge of preliminary work shall carefully canvass a list of concerns that should be identified with the foreign selling organization. The character of the concern and the nature of its products are important.

(2) On completion of the list, a meeting should be called for the purpose of discussion and, if possible, of organization.

(3) Each concern should at the beginning agree to advance a certain amount of money to cover initial expenses of organization, of investigation of foreign territories, if that is needed, and for preliminary sales and propaganda work, which is necessarily expensive and which should be regarded as an expense rather than a capital expenditure. The payment of these amounts can be extended over a period of one or two or three years, if desired. The amount should be sufficient to meet all legitimate requirements.

(4) The stock of the company may be divided into two classes, common and preferred. The manufacturers should, so far as possible, and the large ones particularly, subscribe to the common stock. The preferred stock may be sold to investors. There would seem to be considerable advantage in having a substantial number of stockholders in the selling organizations, both because of the additional capital which could thus be furnished and because an investment abroad creates a wider interest in foreign trade and foreign affairs among our people.

(5) Manufacturers subscribing to the common stock should furnish their products to the selling organization at a slight manufacturing profit. This profit must necessarily depend upon the character of the article sold; specialties can carry a fair manufacturing profit and also a reasonable selling profit; highly competitive commodities, which will generally represent a surplus, must be sold at a minimum of profit by the manufacturer and the selling organization. In some cases it will be advisable for the manufacturer to allow the selling organization a commission on sales and to carry the credit burden; the selling organization may in such an event guarantee credits if the commission is adequate. This arrangement should generally cover only such products as are not carried in stock by branch houses, unless the manufacturer is prepared to consign the stock.

(6) The factories shall furnish the selling organization with necessary advertising matter in the way of pamphlets, circulars, price lists, etc., printed in the language of the country in which the goods are sold, without expense.

(7) The selling organization shall assume all expenses, except advertising, as noted above. It shall finance all sales, paying the factories as may be agreed, and shall assume all credit risks. It is regarded as important that the smaller factories be relieved from any excessive credit burden, as it is believed that the suggestion of credit risks or of long-time sales will deter many from export endeavor.

(8) The capital of the selling organization should be sufficient to finance its expected sales and to command reasonable credit from banks. Its management must be as competent as can be obtained. The organization should, as experience and success warrant, establish agencies or branch houses in all important centers. It is to be strongly urged that while ample capital and facilities be provided for in advance, the beginnings be moderate and conservative. While progress in the foreign field is necessarily slow and some early discouragements may be met, it is probable that proper management will bring the success which will warrant steady development.

(9) The selling organization must be autonomous to obtain results. Its management should be amply compensated. It should be controlled by a Board of Directors having knowledge of manufacturing conditions in this country and with some knowledge of the possibilities and needs of export business. The management should have entire control of the selling organization and of credits.

Simplicity of organization and the utmost economy in operation will be more surely obtained if the selling organization is autonomous and has profit opportunities.

(10) It will be recognized that this plan contemplates an organization representing a large number of manufacturers and that its problems are rather different from an organization representing a comparatively few factories or selling a compara-

tively few articles of large tonnage or value. The majority of the factories coming into this plan will depend most largely upon the domestic market for their success, and a moderate surplus only will be available for export. The sale of this surplus abroad, however, will enable them to keep their plants running at full capacity and with reduction of overhead and manufacturing costs. In time this condition may change and the opportunity given the manufacturer to share in the potential profits of the selling organization may become most important. The essential thing today is to establish strong, competent, American selling organizations for the foreign field, and if this can be done it is believed that the ultimate results will be satisfactory.

A Suggestion to Individuals

Another suggestion which is offered, and this may more largely affect the individual than a group of individuals, though the group plan is advised, is as follows:

Let the individual manufacturer or a number of manufacturers send an entirely competent man to investigate certain markets. If the field seems hopeful and difficulty is encountered in raising the capital required to finance the business cooperatively, endeavor to interest some of the many responsible commission houses operating from New York or elsewhere in this country, and arrange with some entirely responsible house to put in a local stock of goods on such terms as may be arranged. Supply such commission merchant with a technical salesman, if necessary, at the expense of the manufacturer. The advantage of this plan will be that the commission merchant is or should be entirely responsible for the ultimate payment for the goods shipped, and for the accounts. It eliminates credit risks, and in many cases such an arrangement may be preferable to the organization of a separate company, even though the selling profits be less. We have many splendid commission houses in this country that should be urged to put in local stocks for the benefit of American manufacturers, and for the purpose of giving the best local service to customers. In practically

every case of this kind, however, it is necessary to supply a competent technical salesman so that the merits of the goods sold can be properly presented to prospective customers.

Suggested Trial Organization

The following is suggested as the best method for those concerned who do not feel warranted in investing a considerable amount of cash in an export business to begin with. The first necessity for this organization will be the employment of a competent manager, and it is suggested that he first of all familiarize himself with territories and decide on the best market in which to commence operations.

Let five or ten concerns, manufacturing or handling articles required by practically the same line of customers, and more or less closely related, organize a company of say ten or twenty thousand dollars, each subscribing from two to four thousand dollars of stock, this capital to be used in financing the initial expenses of the business. Then let each concern consign its goods at their lowest export prices on the agreement that payment shall be made as payments are received from the ultimate purchaser. The manager may have either a straight salary, or a salary and a commission, the latter based either on the volume of his sales or the amount of his profits, preferably the latter. In this way the amount of cash required will be comparatively small, and the amount of goods consigned by each need not be large. The result, if unfavorable, will not bring a heavy loss to any one concern, while, if success comes, the profits will be quite satisfactory. Arrangements should be made that after a period of say three or five years the capital of the company may be increased, and the consignment accounts cut out. If Americans tackle this export business in the right way, it will be a question of time, merely, before the investing public will become interested in the capital stock of exporting concerns as an investment, and the capital requirements from the manufacturer will be lessened. It must always be remembered that the cost of freight, duties, and placing goods in any foreign country is rather

heavy, and that cash money is required for these expenses. It must also be remembered always that credit is absolutely essential for doing business in practically any country, and that capital must be provided for this purpose.

IV.

A GROUP OF MANUFACTURERS MAKING SIMILAR AND GENERALLY
COMPETING PRODUCTS, WHO CO-OPERATE WITH ONE
SELLING ORGANIZATION ON A COMMISSION BASIS.

For certain groups of manufacturers making competing or similar products but whose surplus for export is limited and whose product is highly competitive, it is suggested that they unite upon one or two existing capable selling organizations in touch with foreign buyers. These selling organizations should have agents or travelling salesmen covering the field, and their province will be the sale of the products of this group to existing houses. The compensation of such selling agents should be solely upon an arranged commission basis. The purpose of this plan will generally be to sell to wholesalers or large retailers, and, as their credit is generally good, it will be possible to discount drafts drawn on them and enable the selling agent to promptly pay the manufacturer. The selling agent must be compensated in its commission for the credit risk and the expense of discounting drafts.

Such a group should determine in advance upon the tonnage which can be exported and must hold this tonnage at the service of the selling agent. Orders may be placed with factories or mills most in need of business, with an agreement that profits and losses shall be pro-rated among the group according to the tonnage available for export. It may on occasion be desirable for one factory to furnish a substantial amount of its products for export without profit, or at a loss, and such factory should be compensated by the others in the group. On the other hand, a factory supplying an excess amount of its product at a high profit must share its profit with the rest of the group.

V.

A GROUP OF PRODUCERS OF RAW MATERIAL, SUCH AS COTTON OR WHEAT, WHO UNITE IN ONE GENERAL SELLING AGENCY FOR THE DISPOSITION OF THEIR EXPORT PRODUCT.

To meet either governmental buying or a combination of buyers from abroad, it may be desirable to have our cotton growers, our producers of wheat and of raw materials, co-operate in the formation of a single selling agent or agency for the sale of their product abroad. Such a plan would stabilize prices and probably reduce the expense of selling. Such an agency, or bureau, could be simple in form and inexpensive in operation. As the buyer always pays the cost of transportation from the seaboard, and as he is largely responsible for methods and form of payment, the detailed work of such an organization would be substantially less than those engaged in selling manufactured articles abroad.

It is suggested that an agent or company be selected for handling this form of business, and that all producers of each product place their available tonnage for export with that agent. The business can be handled on the basis of a very small commission, or, if preferred, by the payment of a salary which should naturally be substantial in order to secure the services of entirely competent individuals. Where the product is controlled by a large number of individuals or concerns, it would seem desirable to have the entire export business handled by one concern, so that there may not be an unnecessary and unfair competition between the sellers. In certain commodities it may be advisable to form a strong selling company, financially equipped to handle and store products until a favorable market can be obtained. Generally, however, this would be unnecessary as those products can be marketed gradually. Our home markets will take a large proportion of these products in any event, and it would seem advisable to have our exports go forward with some regularity of shipments, rather than in large amounts at particular times, except as prices and transportation rates may call for increased shipments.

FACTS WORTH KEEPING IN MIND.

In connection with the formation of an export association under the Webb-Pomerene Law certain important facts should be firmly grasped and constantly borne in mind, viz.:

First: The Webb-Pomerene Act does not specifically designate a corporation as the proper or necessary organization for carrying on export business. Any combination of individuals will answer the purpose. In the majority of cases, however, the corporate form will prove the most practical and efficient means of conducting the business. Avoidance of interruption of the enterprise through death of members, obviation of individual liability; duration practically unlimited—all these paramount advantages pertain to the corporate form.

Second: If the export association within thirty days after its creation files with the Federal Trade Commission copies of its charter, by-laws, partnership papers, contract of association, a verified written statement setting forth the location of its offices or places of business, and the names and addresses of all its officers, stockholders or members, and a like statement with amendments to and changes in its charter or agreement on January first of each year thereafter, and conducts its affairs as prescribed by law, it has done all the statute requires. No certificate or license is demanded. The statute does not provide that the manner of organization shall be approved by the Commission. It may be advisable, obviate misunderstanding, and save expense and delay if doubt exists whether or not a given method or practice is proper or not, to communicate with the Commission regarding such matters, prior to filing the papers mentioned.

Third: It is important that the charter powers of an association, or that section of the articles of agreement of an unincorporated association which sets forth the purpose for which it is organized, shall be distinctly limited "solely and actually to export trade," as that term is defined in Section 1 of the statute. (See page 289.)

Fourth: Failure to file the organization papers, including

lists of officers and members, involves a fine of \$100 a day; and the association presumably forfeits the benefits of the Act.

Fifth: Prohibitions directed against "unfair methods of competition" in domestic commerce apply with equal force to transactions carried on in export trade.

Sixth: Export associations must not engage in importing.

Seventh: An export association must not be a mere price-fixing agency. It must be engaged in bona-fide exporting. It becomes liable to prosecution by the Department of Justice, under the Sherman Anti-trust Law, if it engages in fixing domestic prices.

CHAPTER XVI.

The Webb-Pomerene Law in Operation.

Practical Results Obtained.

More than two years have passed since the Webb-Pomerene Act was placed on the statute books of the United States, having been approved by President Wilson on April 10, 1918. The interval which has elapsed since that date covers a period so wholly abnormal as not to permit of any final conclusions as to the operation of the Act. Nevertheless, a survey of its general working up to the present time, from a legal as well as an economic point of view, may show how far the expectations of those who advocated the enactment of this law have been realized. In addition to this, certain trends of development can be readily observed in connection with the operation of the Act which open up a number of interesting new phases in the history of trade combinations, and in a wider sense of international trade. Then, too, an analysis of the forms of organization, and of the agreements of some typical export associations will prove of interest in several ways.

Enumeration of Exporting Concerns Qualifying Under Act.

According to data published by the Federal Trade Commission in its annual reports about one hundred concerns have filed certain statements under Section 5 of the Webb-Pomerene Act since its passage. Many of these concerns did not qualify under the Act, some being ordinary export and import commission houses, others having registered without a thorough consideration of the law in the belief that they could obtain some advantage thereby, still others in order to avoid any question as to the penalty imposed by section 5.¹ Omitting all the concerns which

¹U. S. Federal Trade Commission. Foreign Trade Series, No. 1, p. 7.

Phosphate Export Association, 1 Wall St., New York, N. Y. '
 Pipe Fittings & Valve Export Association, Care A. E. Rowe, Secy.,
 Branford, Conn.
 Redwood Export Company, 260 California St., San Francisco, Cal
 Textile Manufacturers' Alliance, Inc., 11 Thomas St., New York, N. Y.
 United Paint and Varnish Export Company, 601 Canal Road, N. W.,
 Cleveland, Ohio.
 United States Alkali Export Association, Inc., 171 Madison Ave.,
 New York, N. Y.
 United States Forest Products Co., Care Corporation Trust Co., of
 Delaware, Dover, Del.
 United States Handle Export Co., Piqua, Ohio.
 United States Maize Export Association, 17 Battery Place, New York,
 N. Y.
 United States Office Equipment Export Association, 350 Broadway,
 New York, N. Y.
 United States Provision Export Corporation, 308 Webster Bldg.,
 Chicago, Ill.
 Walnut Export Sales Co., Inc., 115 Broadway, New York, N. Y.
 Walworth International Company, 44 Whitehall St., New York, N. Y.
 Wisconsin Cannery Export Association, Manitowoc, Wis.
 Wood Pipe Export Company, 701 White Bldg., Seattle, Wash.

Location of Member Concerns.

The forty-five concerns listed above comprise a total of 754 members, whose plants and factories number about one thousand and are distributed over forty-six states of the Union. In the state of New York there are 118 plants, in Pennsylvania, 87, and Massachusetts, 81. Along the Pacific Coast we find 15 plants in California, 62 in Washington, and 19 in Oregon. In the North Central States there are 35 in Illinois, 46 in Wisconsin, 29 in Minnesota and 18 in Michigan. In the South there are 16 in Texas, 5 in Louisiana and 10 in Florida.

The products and commodities exported by the different export associations are drawn from all sections of our country. From California go out lumber, hardware, chemicals, fertilizer, general merchandise; from Illinois, meats, evaporated milk, iron and steel, lumber, distilled spirits; from Michigan, furniture; from Maryland, paper, canned foods, leather; from Massachusetts, textiles, paper, hardware, soda pulp. Other commodities shipped from various states are copper, agricultural and textile machinery, building materials, cement, locomotives, webbing material, paints, varnishes, dye-stuffs and tanning materials, phosphates, soap and cereals, including wheat and corn products.

Associations Comprise Both Large and Small Concerns.

The individual members of the associations constitute small and large concerns, some with as small a capital as \$10,000, and employing but a small number of workmen. In some of the larger plants thousands of American workmen are employed.

Viewing the situation as a whole, therefore, we see the effects of this new trade machinery reaching out into every part of our country, opening up new arteries of commerce, stimulating industrial life, and above all, helping to promote our export trade.¹

LEGAL FORM OF EXPORT ASSOCIATIONS.

Methods of Organization Enumerated and Compared.

A comparative analysis of the structure of export associations is valuable and interesting from the viewpoint of the lawyer as well as of the economist. Moreover, the American business man, interested in export trade, will find it helpful to familiarize himself with the methods employed in putting together some of the typical export associations. We shall first consider some outstanding legal features.

Principal Classes are the Incorporated and Unincorporated.

The associations organized thus far under the Webb-Pomerene Act group themselves readily into two distinct classes, viz., incorporated and unincorporated associations. The greater number operate under the corporate form of organization. This class includes most of the larger associations, if we take into consideration not so much the number of members as the amount of working capital and the volume of export business handled through the central export sales agency.

Delaware Corporation Laws Prove Attractive.

Many of the large export associations are Delaware corporations. The liberal provisions of the corporation law of Dela-

¹Address of Commissioner Huston Thompson at Seventh National Foreign Trade Convention, San Francisco, May 14, 1920.

were apparently prompt lawyers to choose that state in preference to others for the purpose of incorporating export associations. The latitude as to tax matters, resident agents, the location of a corporation's main office, its books and records, etc., which the Delaware corporation law allows, reflects itself plainly in the charters of the respective associations.¹

Three Groups Include Majority of Corporations.

A comparison of the articles of incorporation and by-laws of the various associations indicates a considerable degree of uniformity in substance as well as in form and phraseology. Two or three standard types can be distinguished, which apparently served as models for others. The wide publicity given to the charter of the Consolidated Steel Corporation may explain why the wording of certain provisions contained in the charter of that association has apparently been adhered to so closely by others. For a copy of that charter and of the charter of the Namusa South American Corporation, see Exhibits 16 and 17. Further examples of forms of organizations created under the Webb-Pomerene Act were published by the National Shawmut Bank of Boston in a special pamphlet entitled "The Webb Law."²

Methods of Control Employed.

The provisions relating to stock distribution and control as well as voting power constitute one of the most important elements incorporated in the usual corporation charter of these associations, or in the articles of agreement, if the association is unincorporated. In only a few associations do we find each stockholder entitled to one vote for each share of stock held. In most cases each member has only one vote, irrespective of the amount of capital stock held by such member. The stock of all large corporations is held for five years in a voting trust and the control is determined in advance for that period.³ One export association raises its working capital out of non-voting

¹The corporation laws of Delaware are contained in the Revised Statutes of the State of Delaware, 1915, chapter 65 fol., p. 910 fol.

²pp. 19-26.

³These and following data are taken from *The Americas*, April 1919, p. 27 fol.

preferred stock, and the voting control is vested in common stock issued to four trade associations which comprise the export association. A certain copper export association raises its working capital out of non-voting preferred stock, the voting control being vested in stock without par value which is allotted, one share each, to each participating copper producer, whose voting strength in respect of such share without par value varies according to the amount of the copper production of such copper producer. A certain unincorporated association, which has no stock whatever, is controlled by two-thirds vote of its participating members, the expenses of the association being defrayed out of assessments upon the members who compose the export association. A certain incorporated lumber export association raises its working capital out of stock which is then assigned by the stockholders to stock trustees, who vote as directed by majority vote of the stockholders assigning such stock. Another incorporated lumber export association raises its working capital out of non-voting preferred stock, control being vested in stock without par value, of which each lumber producer has one share. In a further lumber export association, incorporated, capital stock is subscribed by the lumber producers in proportion to their productive capacity, but is voted upon the basis of one vote for each lumber producer, regardless of the number of shares such lumber producer owns. Still another incorporated lumber export association raises its working capital out of non-voting preferred stock, control being vested in common stock held by the original subscribers to the preferred stock in the same proportion as their holdings of preferred stock.

Mr. Montague, from whose discussion the foregoing facts have been taken, thus summarizes the subject:¹

"Working capital may be raised out of capital stock, with or without par value, with or without voting power, and with or without preferences as to dividends and other rights. Subscriptions for this purpose may be required on the basis of productive capacity, or total sales, or export sales, for the preceding year or averaged over a number of past years. Voting control may attach to the stock out of which

¹l. c., p. 27 fol.

the working capital is issued, or it may be vested in stock of another class. Voting control may be distributed according to the subscriptions for working capital, or upon a basis providing for equal voting strength to each participating member, or according to the relative export sales, or total sales, or the productive capacities of the participating members, as they vary from year to year during their connections with the export association.

"These arrangements may thus require capital stock of various classes, preferred, common, or stock without par value, with various preferences and limitations in respect of dividends and voting power, and sometimes agreements among stockholders providing for a voting trust, by which may be enlarged or limited the voting power or rights of the stockholders according as various contingencies may arise out of their performance or non-performance of their obligations to the export association."

Stock Issues Vary in Nature and Amount.

The amount of authorized and paid-in capital stock varies greatly. One large association has an authorized common stock of \$10,000,000 with \$1,235,000 paid-in. Another association has 100 shares of common stock without any par value, but with voting power, and \$100,000 preferred cumulative stock entitled to seven per cent. dividends but with no voting power. A third association has an authorized common stock of \$250,000 par value, but its paid-in stock amounts to only \$11,000. Still another association, the agreement of which runs for five years, has a capital stock of \$100,000 and began its business with \$25,000. Under a provision of this association each member is to hold not more than 20 per cent. of the issued capital stock, except when otherwise permitted by holders of 75 per cent. of the capital stock. The American Webbing Manufacturers' Export Corporation is a joint stock company, capitalized at \$100,000, the stock being subscribed to by the seven constituent corporations, roughly in proportion to their size. Each stockholder has one member on the Board of Directors, and one vote, regardless of the amount of stock held.¹

¹Edwin E. Judd, in an address on "Export Management under the Webb-Pomerene Act," delivered at the Seventh National Foreign Trade Convention, San Francisco, Cal., May 14, 1920.

Provision Limiting Activities to Export Trade.

A point which merits special attention in discussing the legal structure of export associations is the clause in the charter or agreement of an association which plainly limits the purpose and activities of the association to the provisions of the Webb-Pomerene Act. It is particularly important that the powers of an export association in order that the same may qualify under that Act be limited to engaging solely and actually in export trade as the latter term is defined in Section 1 of the Act. The following limiting clause, used in the charter of the Consolidated Steel Corporation¹ has been followed as a model by numerous other associations:

"To engage solely in export trade as the term export trade is defined in the Act of Congress approved April 10, 1918, entitled, 'An Act to Promote Export Trade and for Other Purposes,' commonly known as the 'Webb Act,' namely, 'trade or commerce in goods, wares or merchandise exported or in the course of being exported from the United States or any Territories thereof to any foreign nation,' and as defined in any and all Acts of Congress amendatory of or supplementary to said Webb Act, and, in connection with such trade, to do any and all things necessary and incidental thereto, including the following, provided that this corporation shall not have power to do any act or thing; because of the doing of which it would be deemed to be engaging in business other than export trade as defined by the said Webb Act and any and all acts amendatory thereof or supplementary thereto."

A Precedent for an Omnibus Clause.

By reason of the fact that it is customary in the ordinary charter to make the powers of the corporation as potential and all-embracing as possible, it is advisable to add a final summarizing clause which limits all the charter powers of the corporation to the provisions of the Webb-Pomerene Law. The following draft of a final clause, added at the end of the various

¹See Exhibit No. 16, pp. 284-297.

clauses setting forth the powers of an export association contains features which are worth noting. In the form of a summary, it limits all the various preceding clauses to the provisions of the Webb-Pomerene Law and supplementary and amendatory laws, as well as to regulations by the Federal Trade Commission, viz.:

"The foregoing clauses shall be construed both as objects and powers and the enumeration of specific powers shall not be held to limit or restrict, in any manner, the general powers of the corporation and the enjoyment thereof as conferred by the laws of the State of or of the United States and the objects and powers specified in any clauses shall, except where otherwise expressed, be in no-wise limited or restricted by reference to, or in reference from, the terms of any other clause, but the objects and powers specified in each of the clauses shall be regarded as independent purposes and powers; provided, however, that the same be, in all respects, subject to, governed by, and not inconsistent with the laws under which the corporation is organized and the Act of Congress entitled 'An Act to Promote Export Trade and for Other Purposes,' (Public 126, 65th Congress) approved April 10, 1918, and any Acts amendatory thereof or supplementary thereto and any and all lawful orders and regulations of the Federal Trade Commission made thereunder."

PREVENTION OF STOCK CONTROL BY ONE PARTY OR A RING.

Various devices are used to prevent a majority of the stock or control of an association from falling into the hands of a "ring." In order to prevent any one member from gaining control of the association through stock acquisition a large lumber association has inserted the following clause in its agreement:¹

"All of the stock owned by the stockholders in this corporation other than one share each, to be held by the stock trustees of this corporation, shall be assigned to and held in trust by the stock trustee or trustees whose power to sell

¹Davies, J. E.: Combination for export under the Webb Act. (Reprinted from the Annals of the American Academy of Political and Social Science). pp. 4-5.

and dispose of such capital stock so held in trust shall be limited to sales thereof to legitimate manufacturers of lumber on the Pacific Coast only, and such sales shall be further restricted so that no one manufacturer individually or through affiliated interests shall ever become a majority owner or holder or be able to exercise a dominating control of the capital stock of this corporation. Whenever any person, firm or corporation shall make application to become a stockholder in this corporation and to purchase one or more shares of its capital stock and such application is approved by the Board of Trustees or such committee or officer as it shall thereunto authorize, a share or shares of the stock so held by such trustee or trustees shall be canceled and a like number of shares in lien thereof issued to such purchaser who shall forthwith endorse and deliver the same to said stock trustee or trustees to be held with like stock by such stock trustee or trustees. No sales or transfers of the capital stock of this corporation to any other than an actual manufacturer of lumber on the Pacific Coast shall be valid and in case of the death of any stockholder or the dissolution of any corporate stockholders or the insolvency or bankruptcy of any such stockholders or in case any stockholder voluntarily for a period of one year cease to continue in the manufacture of lumber, then and in that event this corporation shall have the right to call in, retire and cancel the capital stock so held by such stockholder upon payment to the heirs, executors, trustees or successors in interest of such person or corporation to an amount equal to the par value but not exceeding the par value of such stock."

FAILURE TO COMPLY WITH MEMBERSHIP OBLIGATIONS.

Most associations have incorporated penalty clauses in their agreements against failure of members to abide by the terms of the agreement or contract. Similarly, provisions are made quite generally regarding the settlement or arbitration of disputes:

"Thus one association makes provision that in the event of the failure of a stockholder to observe and comply with the requirements of the board of trustees adopted in pursuance thereof or to carry out any provision or agreements of the contracts or to discharge any obligation to it, the board of trustees may repay or tender the stockholder

the book value not exceeding the par value of said capital stock, less any indebtedness owing to the corporation by said stockholders, and may thereupon cancel said stock and re-issue said shares of stock to the stock trustee or trustees held by said trustee of stock or to some person, firm or corporation who may become a stockholder in the corporation. In the event of the cancellation of the shares of stock it is provided that all right and interest of the original holder in and to the shares of stock shall immediately cease and determine and the same shall be forfeited to the corporation. Another provides that if a member is unable to make delivery as agreed and an extension of delivery is not satisfactory to the vendee, the corporation may cancel the purchase and place the order with another member mill at prices, terms, etc., not exceeding those of the original sale. The original mill must under such circumstances pay one-half of the flat brokerage, the new mill paying the regular brokerages the same as if the order were received originally by it. In case of unreasonable default in delivery, a member is not entitled to further orders until the delinquency is made good."

ECONOMIC PHASES OF THE STRUCTURE OF EXPORT ASSOCIATIONS.

The economic and commercial working plan according to which the whole machinery of the export association is to function is generally fixed in the form of a separate agreement between the participating members and the association. This practice has been followed by most incorporated associations. In some cases the basic regulations for the internal machinery of the incorporated association are worked in by means of the articles of association. From the viewpoint of the economist and of the business man these agreements constitute the most fruitful source of material for a study of the organization and by-laws. In the case of unincorporated associations a scheme covering the plan of operation is generally embodied in the actual operation of export associations."

These agreements indicate the policy to which the association

¹Op. cit. pp. 6-7.

²See Exhibits No. XVI and No. XVIII, pp. 488, 512.

is committed as regards uniform prices, terms of sale, allotment of orders, division of profits, delimitation of markets, etc. They also establish the degree of independence of the individual members, as well as the co-ordination and solidarity vested in the associations. We find reflected in these agreements a great variety of problems bearing not only upon whole industries but also upon different groups in the same industry. On the careful formulation of the details of the machinery depends in an essential way the harmonious relationship of the individual members to one another and to the association and the ultimate success of the whole enterprise. Internal matters of this kind have proved the rock upon which most cartels or combines have foundered in the past, as the history of cartels shows the world over. A very large part of the litigation recorded in the cartel judicature of Germany, Belgium, France, Italy, etc., grew out of disagreements, breach of contract, etc., in connection with apportionment or allotment agreements.

Association May Consist of Amalgamated Interests.

From the viewpoint of solidarity two types of associations can be distinguished. The first type of association represents a complete merger of the export business of the members. An example of this class is the Consolidated Steel Corporation, which represents a high intensive organization of the export business of twelve important steel concerns. All export business of the members is done through the association, which establishes base prices at which members must furnish their allotted quota. The second class comprises associations of a less concentrated form of organization, where participating members retain a certain degree of independence. To this class would belong associations, the members of which would export only certain grades or varieties of their products through the association, exporting the remainder of their export products through other channels.

The best example of export associations falling under class one is the Consolidated Steel Corporation. It resembles most closely such advanced types of joint sale syndicates, as the

Rhenish-Westphalian Coal Syndicate, the former Steel Syndicate of Germany, the Comptoir d'Exportation des Fontes de Meurthe-et-Moselle of France and other highly centralized joint selling agencies in foreign countries.

A more detailed discussion of the internal organization of the Consolidated Steel Corporation will prove interesting from various points of view. In the following we quote freely from articles on the subject which have appeared in "The Americas."¹

Instance of Such Complete Combination.

"The Consolidated Steel Corporation is a Delaware corporation. Its present issued capital is held in varying amounts by the member-companies, in proportion to their output and to the association allotment of business resulting from foreign sales.

"All the stock allotments owned by the member-companies are held by a Board of Trustees, practically identical with the Board of Directors, and the Board of Directors, while chosen by the majority of stock-interest as in ordinary corporations, must be elected from a list nominated by the trustees. The present board appears to represent the member-companies, each having a director, with one over in the person of the President of the Corporation. If any member-company fails to perform its agreements, by delays in delivery, faulty construction of products, or in any particular which the Board of Directors considers prejudicial to the corporation's business, or of a character likely to be prejudicial, it shall become liable to a fine of 10 per cent. of the export corporation's gross selling price for the tonnage involved in the transaction, as liquidated damage, which shall be recouped out of sums then or afterwards owing, or payable on demand. When any member-company is delinquent to such a degree that three-fourths of the Board of Directors by formal vote after a hearing consider it should no longer be a member of the association, the trustees may, after ten days' notice, buy that company's trusted stock and pay the portion of surplus earnings and so expel it. Every December 31 there shall be an adjustment of stock allotments.

"About September 30 of every year the member-companies

¹Vol. 5, No. 5, February, 1919, p. 8 fol. Cf. also Exhibit No. 16, p. 484.

and the directors of the corporation agree upon a quota of 'promised products' of steel and iron, this generally being 10 per cent. of the total output of all finished products of a member-company and fully representative of the range of each member's production.

"This tonnage is expected to be available in approximately equal monthly installments. But the directors may decide that certain deliveries are not required—in which case they must give notice of it before the first of the delivery month—and in that case or of any installment not taken, it automatically ceases to be the obligation of the member-company to deliver, and usable as it sees fit. When the corporation's foreign sale demands tonnage beyond the 'promised products' it will call for them *pro rata*, but the members are not required to deliver.

"No member is permitted to sell for export except through the corporation except by special agreement expressed in writing.

"The export corporation by its directorate representative of all the member-companies fixes provisional export prices quarterly, subject to current differentials. Member-companies pay freight to point of export; the corporation bears all charges for freight, insurance, etc., beyond the port of shipment, and assumes the duties and risks connected with credit and collections. The corporation settles with member-companies 75 per cent. net cash within thirty days and the remaining 25 per cent. on or before the last calendar day of the quarter, less $2\frac{1}{2}$ per cent. for current contribution to overheads. This settlement is on the basis of the provisional prices. The corporation is expected to obtain these prices if possible. Every quarter there is a reckoning by which the corporation pays a bonus or collects a deficit of expenses *pro rata* the allotment scale."

Webbing Export Association.

The American Webbing Manufacturers' Export Corporation operates as follows, viz.:

"The export corporation is not designed as a profit-making organization, the profits on sales going directly to the individual companies. Basic export prices are fixed by the individual manufacturers, and the export company is allowed a fixed percentage on each sale, which is estimated to cover its cost of operation. Such profits as the company

may show through economy of operation, are applied to the reserve fund, the by-laws providing that no dividends shall be paid until the reserve is equal to one-half the paid-in capital.

"Each of the constituent companies then made a contract with the export company for the handling of all its export business, except trade with Canada, for a period of two years.

"The export company sells in its own name and under its own trade mark, carries its own credits, and attends to its own financing, like any ordinary export company, except that its current liabilities are chiefly to its stockholders; and in times of restricted banking facilities like the present, it is able to pass the credit burden back to the constituent companies when necessary."¹

Domestic and Foreign Conditions Demand Various Types.

It is interesting to observe the different methods followed by certain export associations relative to the handling of orders for goods.²

"Certain lumber producers have given their export association the same right without limitation as to the percentage of their production. Certain other lumber producers have given their export associations the right to purchase lumber from them without limitation as to the percentage of their production, but at prices not less than cost of production. In some export associations the participating members are not required to furnish any goods if the price offered by the export association is unattractive to the participating members. * * * Other arrangements that have found favor in several export associations have left the participating members free as to what percentage, if any, of their output they must furnish to the export association. From month to month these participating members notify their export association of the quantities they have available for export, and the export association allots orders among them in proportion to the quantities they have placed at the disposal of the export association, prices, however, being always fixed by the export association within its uncontrolled discretion.

¹Edwin E. Judd, *op. cit.*

²The Americas, vol. 5, No. 7, April, 1919, p. 28 fol.

"Whether the export association shall buy the products which it sells, or shall act as agent in selling the products of its participating members, is a question which different export associations have answered in different ways. Not only the character of the product and the customs of the particular industry, but also the tax laws of the various States and of the United States, and even more important, the tax laws of foreign countries in which the export association may engage in business, must be carefully considered in this connection before determining upon the form of arrangement between the export association and its participating members."

Ingenious Plan for Joint Representation.

The Namusa Corporation represents a novel scheme of export organization.¹ This association was recently organized as an independent export corporation under the auspices of the National Association of Manufacturers. Any member of the latter association may become a member of the Namusa Corporation. The stock of the corporation is all common, non-dividend, non-assessable and without par value. Each stockholder is limited to one share. The stockholders are organized within the corporation into export trade groups, along industrial lines, each of which may comprise competing or non-competing lines of goods. A special mercantile department within each group handles the particular export trade activities of that group. Special selling arrangements may be made by individual stockholders, either within or among the groups, along either competing or non-competing lines. The corporation is contemplated to engage in actual export trading for its stockholders and also to develop foreign markets. Participation in group selling is voluntary. Expenses are defrayed by contribution by the participating stockholders or out of commissions on export sales through the corporation.

¹See "Export trade development. A plan for the organization and conduct of export corporations by members of the National Association of Manufacturers under the Webb-Pomerene Act;" also, "The Namusa Plan for Export Trade Development," and Exhibit No. 17.

JOINT SELLING AS APPLIED TO TRADE-MARK GOODS AND SPECIALTIES.¹

Associations Operate Successfully in Distinctive Articles.

It has been stated that export associations under the Webb Act would not be workable in connection with industries covering specialties, and that where trade-mark goods are involved joint selling agencies would not operate successfully. Experience thus far has disproved this theory. One of the most successful export associations now in operation, being at the same time one of the first associations to be formed under the Webb Act, handles specialties. The general manager of this particular association described its operation as follows, viz.:²

"To take up now, some of the problems of management that have arisen with us, we have first, the selection of the line to be offered abroad. Each of the companies submitted a complete sample collection of its products, with prices and data as to construction, available productive capacity, and the relation thereto of domestic demand. The selection was then made by the management and the advisory committee. Non-competitive items being first set aside, it was found that most of the competitive items showed differences of patterns between the different mills. All of the staple patterns of each mill were therefore included, giving the foreign customer an extremely wide range from which to choose. In other cases, different mills made different qualities, so that the inclusion of all the numbers left us only the problem of adjusting export prices to maintain the proper ratio between the different qualities. We had left a small group of articles, all staples, in which the qualities produced by the different mills were identical, and the element of pattern was lacking. As no two mills weave in exactly the same fashion, however, the various webs showed individualities of finish, each of which might appeal to a different customer. We, therefore, assigned a single line number to all the webs of one quality, but designated each mill's product as a different finish. The price for that quality was made uniform by averaging the prices of the various producers.

¹The Journal of Political Economy, vol. 27, No. 7, July, 1919, pp. 530-1.

²Edwin E. Judd, op. cit.

"Division of orders among the various mills on staple items is made very simple, as the pattern, quality or finish selected by the customer automatically designates the mill to which the order is to be sent. When the selection of finish is left to the export company, the order is sent to the mill in position to make most prompt delivery.

"On special orders calling for the making of a special quality or pattern, the sample to be reproduced is referred by the advisory committee to one of the mills equipped to produce that kind of goods. A counter sample is made and supplied to the export company, with full information as to its construction. This data is then sent to all the mills equipped to make such an article, for estimates of cost and approximate delivery. The replies are reviewed by the advisory committee and the order placed in accordance with the committee's decision."

Trade-Mark Obstacles Obviated by Association Management.

It is true that a considerable number of the associations formed, up to the present time, market staple products, like lumber, coal, steel, etc., where there are only a few grades and where no particular trade-mark or individual identity of manufacturing source have to be taken into consideration. But, there are also others where a large number of different kinds of articles are covered by a joint selling agreement. Similarly, the question of trade-marked goods has been solved successfully by a number of associations. One way in which it has been worked out is by the use of a dominating or export trade-mark to represent the export association and indicate the general line of business. In addition to this there is used a subsidiary trade-mark which goes under the dominating trade-mark, as indicating the particular plant from which the product came. The foreign buyer thus has an opportunity to select and purchase the particular product to which he has been accustomed. Several associations have provided for the future use of a special export trade-mark, and are planning to educate their members gradually to give up their individual marks or brands. In line with this are efforts made by certain associations to standardize their products and to eliminate unnecessary styles, grades, brands, etc.

Practical experience has shown that success in reaching a

basis of mutual co-operation in these matters depends very largely upon the experience, tact and enthusiasm of the manager of the association and his ability to overcome petty jealousies and rivalries, as well as disinclination on the part of individual members to give up long-established policies. Certain sacrifices must be made frequently by large as well as small members for the common good.

SMALL MANUFACTURERS AVAIL THEMSELVES OF THE WEBB LAW.

The argument was frequently made in favor of the Webb Bill that it would give the small American manufacturer, who alone cannot afford to build up an export organization, an equal chance with large manufacturers to enter foreign markets. Small manufacturers, it was contended, might co-operate among themselves or jointly with large manufacturers in developing an export trade for their products. The benefits which would accrue to the small manufacturer by combining for export trade were held out by many as a particularly strong point justifying the enactment of a law which would allow such combinations. What has been the result thus far in this respect? While a considerable number of the associations formed up to the present time comprise large concerns, several of them consisting wholly of large and financially powerful concerns, the prevailing tendency seems to be to admit all competitors in an industry who are willing to co-operate and agree to work along with the rest under definite understandings and arrangements. Evidence of this may be seen in the fact that export associations grow in many cases out of trade associations which have existed for many years. Several export associations have provisions in their charters which make admission to membership dependent upon membership in the respective trade associations. One large western lumber export association accepts as members only bona fide lumber manufacturers of the Pacific Coast. As a matter of fact, large manufacturers have in several instances refused to join in the formation of an export association on the plea that

¹The Journal of Political Economy, vol. 27, No. 7, July, 1919, pp. 531-532.

they had already built up an export organization of their own and failed to see any advantage to themselves in giving up their well-established individual organization and joining with business rivals "who never have done any foreign trade." On the other hand, cases are known where some of the largest manufacturers in certain industries were the strongest advocates for joint exporting by all manufacturers, small as well as large, in that industry. At a meeting held for the purpose of forming a lumber export association, a lumber manufacturer arose and said: "I believe the capacity of my mills is the second largest in the United States, but, gentlemen, I don't care if you don't sell one single log of my particular mill, so long as you get rid of the surplus on the domestic market."

Export Trade Law Attracts General Participation.

Furthermore, an examination of the individual member concerns of the different export associations shows that there are many concerns representing a capital as small as \$5,000 or \$10,000 each. So that, generally speaking, it can be said that the advantages of the Webb Law are being recognized and utilized by an increasing number of small manufacturers throughout the country and that evidences of a spirit of mutual fairness and co-operation among large as well as small concerns are plentiful.

How ASSOCIATIONS BENEFIT UNDER THE LAW.¹

A great number of advantages have been held out by speakers and writers as likely to accrue to American business men through co-operation in export trade. In the course of time, as the associations which operate under the Webb Law continue to expand their activities, the practical advantages and disadvantages of combining will become better known. Moreover, a wider field for observation and a greater diversity of material will become available, as the number of different industries grows in which export associations are formed. However, even now specific instances can be mentioned in which certain benefits of concerted

¹The Journal of Political Economy, vol. 27, No. 7, July, 1919, pp. 532-534.

action under the Webb Law have been actually experienced, and in which that Act makes it possible for American manufacturers to promote their export business. That applies, for instance, to a certain lumber export association. In view of the fact that the small sailing vessel has been largely superseded by ocean-going steamers, no one mill belonging to that association was in a position to take care of an entire cargo with facility. The fact that these tramp steamers require prompt dispatch, which was not so important in the case of the old sailing vessel, places small mills with limited facilities at a disadvantage. Certain mills on account of their location could undertake deliveries during the summer season only, and were placed at a disadvantage in engaging in all-the-year-round export business. Furthermore, certain of the most important export products require for their particular production a kind of lumber which under normal sawing conditions is not produced in sufficient quantities at any one mill to make up a cargo; hence the product of several mills must be assembled to furnish the requisite quantity. For these and other reasons it appears that if any substantial export business was to be done by this particular industry, co-operation was necessary.

Export Associations Compile Trade Information.

Accurate data on the cost of doing foreign business, including current information on consular fees, stamp duties, credit information service, collection charges and numerous extra charges, are now being compiled by several export associations for the benefit of their members. Other associations have sent special commissions abroad to make a survey of foreign markets. In a recent number of the London Times, attention is called to "an interesting situation which heralds a reversal of policy" on the part of certain American manufacturers who have organized an export association. The correspondent goes on to say that although the United States sold a considerable quantity of the respective goods in the United Kingdom before the war, most of the sales were made practically without solicitation to

British business men who visited the United States and noted with favor the equipment and appliances in use. The plan of the new export association now calls for special representatives to develop trade in Great Britain, France and Italy.

Direct Dealing Promoted.

Still another feature of certain export associations consists in the fact that instead of the individual members dealing through export commission houses or importing houses located in foreign countries, the joint export business of the members is now being done direct with customers in the various countries. The policy adopted by some associations of having all shipments inspected as to quality, etc., so as to make them conform to the specifications called for in the contract, promises to become an important factor in establishing a reputation of good service and quality for American-made goods in foreign countries.

Extract From Interesting and Important Address.

Some interesting statements on the actual operation of Webb Law associations were cited by Commissioner Huston Thompson of the Federal Trade Commission at the Seventh National Foreign Trade Convention. We quote from his address as follows:

"In order to procure first-hand information as to the actual functioning of the Webb-Pomerene Law, the Federal Trade Commission some time ago sent out a questionnaire to the various export associations which had filed papers with the Commission up to that time. Among other things the Commission requested an expression of opinion as to the conditions met, the obstacles encountered and the success experienced by the individual associations. The replies received, for the most part, expressed satisfaction over the results obtained under the law.

"One concern wrote as follows:

"The present system of selling for export is a great step in advance over the old method and will eliminate a lot of useless expense and duplication of effort."

"Another association wrote:

'In a general way the members of (this association) feel satisfied with progress so far, when proper consideration is given to the numerous difficulties which have been encountered to date. We are hopeful that within a few months conditions will again become normal, at which time the company hopes to greatly increase its business.'

"Still another association answered:

'The association has been well received by our foreign customers and we have not met with any obstacles other than those presented by present economic conditions. We believe it will be a large factor in promoting our export trade in a satisfactory manner.'

"An association which exports to twenty different countries stated:

'In our opinion, the Webb-Pomeroy Act has made possible the creation of beneficial export conditions, and further, stimulated a wide interest in this country in exports, serving as an incentive to establish new export channels, as well as increase the scope of existing channels.'

"A southern association wrote:

'We have progressed far enough to know that the operations of our companies in an association under the Webb Law is working satisfactorily.'

"An association which handles non-competitive goods said:

'We have found that the fact that one concern is able to supply everything necessary for the equipment of a modern * * * is an advantage in the handling of foreign sales.'

"An association which exports a certain kind of wood product outlined its experiences as follows:

'We have progressed far enough with the conduct of the business of the association to feel very much encouraged over the results obtained. Our system for conducting business abroad is working out very satisfactorily and we are very pleased to state is meeting with the hearty approval of the foreign customers. As for the association members, they all seem to feel that they have strengthened their posi-

tion for the meeting of foreign competition and have derived tangible benefits through the direct agency of the association.' "

Practical Workings of Export Association.

Mr. Edwin E. Judd, general manager of the American Webbing Manufacturers' Export Corporation, discussed a number of interesting experiences of that export association at the Seventh National Foreign Trade Convention, as follows, viz.:

"The factors which led to the formation of the export company were periodical, and to a slight extent seasonal, inactivity in the domestic market; the necessity for holding together a specially skilled group of workers; and a productive capacity in certain lines in excess of the normal domestic demand. * * *

"It is expected that the establishment of outlets in a widespread foreign field, with a consequent counter-balancing of conditions of prosperity and inactivity in the different countries, will act to offset periodical slackening of demand at home, and thus permit the holding together of our mill organization during periods of domestic depression; while trade with the southern hemisphere is looked to to offset some such seasonal fluctuations as now exist.

"The growing popularity of belts and the wane of the Congress type shoe in the United States, have created a condition of over-production in suspender web and shoe lacing which requires the seeking of new markets where 'galluses' and elastic top shoes still hold the popular favor.

"Several of the companies were doing a certain amount of export trade, but in only a few instances were they in direct contact with the foreign customer. This is an especially important feature, as the production of special orders to meet the requirements of fabricators of elastic webbing products is particularly desirable business. For any but the largest companies, the volume of foreign business in sight, however, was not great enough to warrant the maintenance of a special export organization; and for even the largest companies, the economies of operation through a central export organization were important.

"Another factor not much discussed at the time of organization but which has been a great factor in the success of the export company, is the comprehensiveness of the line

which the combination is able to offer. No one of the companies interested produces a complete range of elastic products, but acting together, they offer the foreign buyer everything from an elastic hat cord to the most complicated loom-shaped webs. The extent of the line not only draws customers to this central source of supply, but puts us in position to secure the services of the best agents in each market."

ADMINISTRATION OF THE WEBB ACT.

Method of Officially Supervising Export Trade Practices.

The Federal Trade Commission is charged with the administration of the Webb Act. In addition to requiring every association engaged solely in export trade to file the verified written statement mentioned above, Section 5 of the Act provides that on January 1 of each year each association

shall make a like statement of the location of its offices or places of business, and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation, or in its articles or contract of association.

For copies of prepared forms for making the First Report, due within thirty days after creation of an association, and the Annual Report due January 1 of each year, the reader is referred to pages 469, 473 of this book, Exhibits No. 11 and No. 12.

In Section 5 wide powers of investigation are given to the Federal Trade Commission in the provision that each association "shall also furnish to the Commission such information as the Commission may require as to its organization, business, conduct, practices, management and relation to other associations, corporations, partnerships and individuals." Failure on the part of an association to comply with this provision subjects such association to a penalty and forfeiture of the benefits of the Act.

Special Division of Commission Administers Export Trade Act.

The numerous detailed matters of administration which arise in connection with the administration of the Act are handled by a special division of the Federal Trade Commission, known

as the Export Trade Division. All records required to be filed with the Commission are received, examined and filed by economic and legal experts connected with this division. Current developments relating to prices, market conditions, etc., in this country and abroad are closely followed in so far as they may have a bearing on the operation of the Webb Law.

Commission Act Supplements Export Trade Act.

The investigatory powers of the Commission under the Webb Act are supplemented by Section 6 (h) of the Federal Trade Commission Act which gives to the Commission specific powers to investigate trade conditions in and with foreign countries where associations, combinations or practices of manufacturers, merchants or traders may effect the foreign trade of the United States.

CHAPTER XVII.

Criticisms of the Export Trade Act.

Proposed Regulation of Foreign Trade Arouses General Interest.

The Export Trade Act (Webb-Pomerene Law) has been subjected to some measure of criticism at home and abroad. A careful examination of the principal arguments adduced in opposition to the Act, and of the answers thereto on the part of authoritative spokesmen may help to clarify many of the questions that have been raised.

Congress Gives Full Consideration to Vital Questions.

It should be noted that the Act was passed by Congress in response to a well-defined and quite general demand for such legislation by business men and commercial and trade associations in all sections of the country. It became a law only after careful consideration of the vital questions involved and after extended hearings and debates during the sessions of two Congresses,¹ and not without opposition to the measure both in the House and in the Senate. Three members of the Committee on the Judiciary of the House submitted a minority report against the bill.² The bill was twice passed by the House of Representatives, first, on September 2, 1916 (H. R. 17350, 64th Congress) by a vote of 199 to 25, and again on June 12, 1917 (H. R. 2316, 65th Congress) by a vote of 241 to 29. The Senate passed the bill on December 12, 1917, by a vote of 51 to 11, and it was approved by President Wilson on April 10, 1918.

Principal Opponents Fear Promotion of Trusts.

The fears of those who opposed the bill in Congress were

¹Congressional Record, Dec. 12, 1917, pp. 185, 187.

²Report No. 50, 65th Congress, 1st Session, House of Representatives.

bottomed principally on the following grounds. It was contended that the measure constituted a covert attack upon the Sherman Anti-trust Act and tended to foster trusts and monopolies. Representative Volstead held "The trusts are asking for it. They want it for the trade at home; they want it to destroy the Sherman anti-trust Act, and that is exactly what it will accomplish."¹ Moreover, it was contended to be impossible to separate the export trade from the domestic trade, that in fixing the prices for the foreign trade the combination will fix at the same time the prices for the domestic trade. The fear was expressed that the measure would pave the way for a domination of domestic markets by combines, nominally organized for export trade. Senator Cummins maintained that "It is utterly impossible to authorize combinations and agreements and monopolies of all kinds and sorts with reference to our foreign trade and at the same time preserve intact our protection of the Sherman Law with regard to domestic trade."² Regarding this point, Representative Volstead contended "Everyone in the combination will know at what price goods are sold in the foreign market as in consulting one with another in regard to cost of production and sale of goods in the foreign trade no one can reasonably expect that this consultation will not inevitably involve a like discussion as to prices in the domestic trade and a like elimination of competition in that trade."³ A further objection raised was that export associations would sell American products cheaper to foreign consumers than in the domestic market, and would use the Act as a vehicle for manipulating domestic prices.⁴

Sponsor Defends Bill in House.

In answer to these objections Representative Webb said:

"There has been a great deal of argument here of a very shadowy and scary sort, that great trusts are going to be

¹Congressional Record, June 13, 1917.

²Congressional Record, Dec. 7, 1917, p. 80.

³Congressional Record, April 6, 1918, p. 5115.

⁴Congressional Record, Sept. 2, 1916.

formed. The gentlemen who make that argument evidently have not read this bill because it is hedged about as carefully as it is possible to hedge about any bill. The moment these agencies begin to act so as to be unfair, not to restrain trade, but to be unfair, the Federal Trade Commission can jerk them into the court and stop it by injunction and send them to jail. The moment they begin to restrain trade in the United States the Sherman Anti-trust Law steps in."¹

Representative Graham said:

"I can not conceive how this bill will tend to foster trusts or monopolies. It is impossible, with the restrictive language that is in the bill, for that end to be accomplished.

* * * This is not a measure calculated to help great concerns, for an organization like the United States Steel Corporation, which is so frequently referred to here and made a target of abuse, is strong enough to take care of its own foreign agencies. * * * (If an agency) becomes an element in restraint of trade here and destructive to competition, the saving clauses of the bill will bring the corporation or association offending under the control of the Federal Trade Commission, which can dictate the terms by which its business shall be perfected and made unobjectionable and in case of failure of the corporation to observe these rules, then the offending association is turned over to the Attorney General."²

Senator Pomerene Champions Measure.

In answer to arguments made against the bill, Senator Pomerene said:³ "The Senator overlooked the fact that this bill does not repeal the Sherman Law. He had in mind one paragraph only and lost sight of all the restrictions and qualifications it contains. I submit that when this bill is construed judicially it will be analyzed as a whole and not one part separate from the other. The Senator forgets that neither the associations, nor their agreements, nor their actions can be in restraint of trade within the United States, nor in restraint of the foreign

¹Congressional Record, June 13, 1917.

²Congressional Record, June 13, 1917.

³Congressional Record, Dec. 13, 1917.

trade of any domestic competitor, and they cannot by any agreement, conspiracy or act artificially or intentionally and unduly either enhance prices or reduce prices domestically, and if they do they violate the law of the land."

Opposing Senator Characterizes Anti-trust Laws as Domestic Statutes.

The following remark made by Senator Kellogg in the course of the debate is of interest. "It is asked," he said, "if the Sherman Act is a good thing at home—and I believe it is—why is it not good abroad? This argument on its face seems very plausible, but, like many plausible arguments, it will not bear inspection, and it is, nevertheless, a specious argument. We make the laws for this country and can enforce our policy against every one doing business within our territory, whether he lives in a foreign country or whether he lives here. We do not make the laws for foreign countries, and therefore the most we can do is to enforce on our own merchants dealing in foreign countries a policy of non-coordination, leaving them to fight co-ordinated and combined capital and energy abroad."¹

Official Comments Indicate Extensive Interest Aroused Abroad.

The Webb-Pomerene Law has received considerable attention in foreign countries. In a number of cases foreign observers showed a good understanding of the history and scope of the law, freely recognized its merits and took occasion to point out how it may benefit trade with their country.

Mr. F. W. Field, British Trade Commissioner at Toronto, in an official report to his Government, stated that Ontario manufacturers have been observing very closely the effects of the Webb Act upon their country and that the general view is that in due course it will prove a factor in increasing the trade of the United States with that market.

¹Congressional Record, Dec. 11, 1917, p. 165.

The Hon. F. C. T. O'Hara, Canadian Deputy Minister of Trade and Commerce, discussed the Webb Act at some length in his annual report for the year 1918-1919. He called attention to various advantages in developing foreign markets by means of co-operation and strongly advocated the formation of export associations in Canada. In emphasizing the safeguards and restraints provided for in the Webb Act against misuse by associations of their power, Mr. O'Hara points out one advantage possible with such organization, which is of paramount importance, viz., that the Government would thereby be enabled to obtain any information desired respecting a whole industry more readily than if it has to communicate with many separate, scattered concerns.

Antipodes Voice Adverse Sentiments.

But the Webb-Pomerene Law has also been made the object of hostile criticism abroad, principally in Argentina and Australia.

While it was still before Congress as a bill in 1917, and soon after it became a law certain newspapers in Argentina published protests. The National Foreign Trade Council immediately took steps to clarify the situation and its efforts apparently were successful. The purpose and scope of the Act were explained in South American papers. Attention was called to the fact that the plan was reciprocal and that a reduction to Webb Law associations in the cost of selling and exporting would result in a reduction in the cost to South American customers. It was also pointed out that foreign markets would have all the advantages growing out of increased competition between American exporters and those from other countries. This, it was stated, would stimulate business at home and abroad, export trade being a matter of reciprocity, advantageous to both parties engaged therein.

More recently a movement antagonistic to the Webb-Pomerene Law appears to have spread in Australia. According to press reports, posters were publicly displayed in November, 1919, in certain parts of Australia stating that "the United States'

Congress last year altered its anti-trust laws in order to legalize combines for export trade," and asking, "Are American Combines to Exploit Australia," and urging the public to buy only Australian-made goods.

In a private publication styled "The Australian Tariff Handbook, 1919," the Webb Law is discussed at considerable length. Among other statements the following are significant (page 16):

"The Webb Act says in effect to the manufacturers of America, 'You shall not on any account attempt to exploit American citizens by trust methods, but you are at perfect liberty to prey to the extent of your capacity on foreigners.'

"Overtly an act to facilitate the development of America's export trade, it is in reality an act to promote the capture by American manufacturers of the world's markets by associated dumping."

Commissioner Describes Operation of Export Trade Act.

Commissioner Huston Thompson of the Federal Trade Commission took occasion to discuss the operation of the Webb-Pomerene Act in its bearing on foreign countries at the Seventh National Foreign Trade Convention at San Francisco, California, in May, 1920, and we quote from his address as follows, viz.:

"The law had hardly been enacted when criticisms from business men and organizations of other countries sounded the alarm * * * who, combining for the purpose of invading foreign markets, and also combining to purchase imports, criticised the Webb-Pomerene Act for permitting our industries to do in exporting just what they had been doing. * * * It is strange that the foreign critics of the Act, who must have read it in a most cursory way, failed to take notice of that section which gives the Federal Trade Commission the power to prevent unfair competition among American exporters and to follow through their transactions to culmination. * * * It will be noted that the criticisms aimed at the law do not come from foreign governments or consumers, but from foreign competitors. The officials of these governments have suddenly become awake to the

same situation that confronted our Congress when drafting the Webb-Pomerene Act. In the effort of their manufacturers to push their foreign trade, these governments fear a danger to their domestic consumer. Their problem is well stated in the language of President Wilson in his address to Congress on December 5, 1916, when advocating this bill, he said: 'We should clear away all legal obstacles and create a basis of undoubted law for building up our export trade—a law which will give freedom without permitting unregulated license.'

"In the parliaments of Argentina, Great Britain, Sweden, Norway, the Netherlands and Denmark this dual problem is being debated. The only solution seems to them to point toward the creation of a body such as our Federal Trade Commission with regulatory control over their manufacturers in foreign trade. Canada, after an intimate study of our Commission, enacted a law similar to our Federal Trade Commission Act. Australia and New Zealand have already created bodies similar to the Federal Trade Commission, but no other nation has given any governmental body the authority to regulate the acts of its manufacturers and producers beyond its own shores. To America alone belongs the honor of being the first to take such an advanced step. * * *

"Thus far there have been no complaints brought to the notice of the Federal Trade Commission from foreign consumers against those operating under this law. * * * The Commission under the authority granted to it by Section 4 to extend the powers granted under the Federal Trade Commission Act to competitors of our country engaged in export trade, who have not combined in a Webb-Pomerene association, has already been a corrective force and influence in the matter of preventing unfair competition between such exporters. * * * It is only fair to say that American export business submits itself today under the Webb-Pomerene Act just as our domestic business does under the Federal Trade Commission Act to the supervision of an arbiter on the matter of competition in a manner not required of the industries of any other nation; that today by the Webb-Pomerene Act we are the only nation which has empowered a governmental department to stop unfair practices between our exporters, whether they be in China or South America or in any other part of the world; that in view of this control of the actions of our business men in other countries,

this law should be welcomed as a boon to the consumers of the countries to which we export, and should not be feared by foreign competitors.

"Since we have taken this step is it not proper that we should invite the other nations of the world to likewise supervise their exporters in their methods of competition? Until the other nations do so, the final great step in the reorganization of the world's business is likely to be delayed, i. e., the formation of an International Trade Commission by the nations of the world. * * * In inviting our friends to take this step, we hold out to them as our purpose and intent that which is so beautifully phrased in the speech of President Wilson, in his message to Congress on May 20, 1919, where he says:

"I believe that our business men, our merchants and our capitalists will have the vision to see that prosperity in one part of the world ministers to prosperity everywhere; that there is in a very true sense a solidarity of interest throughout the world of enterprise, and that our dealings with the countries that have need of our products and our money will teach them to deem us more than ever friends whose necessities we seek in the right way to serve.'"

PART FIVE

THE EDGE ACT

CHAPTER XVIII.

Financing Foreign Trade by Means of the Edge Act.¹

Changed Conditions Entail Problems in World Finance.

An entirely new aspect has been given to the whole export situation, as far as the United States is concerned, by the present abnormal financial conditions throughout the world, and more particularly by the difficult credit situation obtaining in international trade.

Solution Must Proceed Along Economic Lines.

The war has left a large part of Europe in dire need of raw materials and manufactured products of all kinds. The war-stricken nations look to the United States as the country best able to aid them in their plight. Since the entrance of this country into the war, in 1917, our government has advanced approximately ten billion dollars to foreign nations. Together with commercial credits extended by American business men, the rest of the world owes us a total of about fourteen billion dollars. A warning that there is a limit to the financial aid which the United States may be expected to extend to Europe was given by former Secretary Glass of the Treasury, reiterated by Secretary Houston. On several occasions Mr. Glass intimated that further aid must come through private and not through government channels. From the last annual report of the Secretary of the Treasury it would appear that credit from the United States government to foreign nations will be obtained henceforth only in cases of relief to avert starvation or other dire distress.

The situation practically amounts to this, that while European governments and individuals desire to buy and American business men are ready to sell, the former have neither gold nor

¹See Exhibit VIII, p. 443, for text.

goods sufficient to balance their purchases and are obliged to seek long-time credit. The United States government not being in a position to extend further credit, and bank credit, which is necessarily short-term credit, not being adequate to meet existing difficulties, there remain available two sources of relief, viz., credits from industrial and commercial sources and credits from the investment market in the United States.

Trade Recovery Demands Long-term Credits.

The simplest way for a foreign credit to be extended would be for the individual manufacturer in this country to give credit to the individual buyer abroad, the former taking the promise of his overseas customer to pay for those articles at some future date instead of demanding cash. As a matter of fact a considerable number of manufacturing concerns in all parts of this country have done this. In a number of cases they procured the necessary funds from the War Finance Corporation. The amendment of March 3, 1919, to the War Finance Corporation Act contemplated possible use of an aggregate of one billion dollars for the extension of long-time credits to foreign customers. The actual loans made by the Corporation directly to manufacturers to aid export trade amounted to about \$30,000,000. The money has been extended to various manufacturers and bankers that sent railroad equipment to Poland, electrical and agricultural machinery to England, France, Italy, Belgium and Australia, food to Belgium and machinery for steel plants to France.

In May, 1920, the Secretary of the Treasury suspended further advances in aid of exports through the War Finance Corporation. The view seems to be gaining ground that, all things considered, the safest and soundest policy of financing American exports in the immediate future is through credits obtained in the investment market.¹

Congress Provides Banking Facilities for Foreign Trade.

To meet this situation Congress in December, 1919, enacted a further law for the promotion of American foreign trade, the

¹The War Finance Corporation was again revived by Congress in January, 1921.

so-called Edge Act. It is in the nature of an amendment to the Federal Reserve Act, and authorizes the formation of banking corporations, operating under federal charters, to do foreign banking, finance exports and carry on such other financial operations as may be necessary to promote the export of goods from the United States. Corporations of this type are permitted to invest in foreign securities and to offer their own obligations, secured by their foreign collateral, to American investors.

Procedure When Organizing Foreign Trade Bank.

Under the terms of the Edge Act, five or more persons may associate for carrying on a foreign banking business under a federal charter. The latter runs for a period of twenty years, and must be approved by the Federal Reserve Board and be filed with it. Corporations thus chartered may purchase, sell and discount notes, drafts, bills of exchange, acceptances and securities, borrow and lend money, issue debentures and receive deposits outside of the United States. Within the United States an Edge Law bank shall receive only such deposits as may be incidental to or for the purpose of carrying out transactions in foreign countries. The minimum capital stock shall be \$2,000,000. A majority of the shares shall be owned by citizens of the United States. Not more than ten per cent. of its capital and surplus shall be invested in any one concern. The Federal Reserve Board is given wide general powers as to the organization of corporations under the Act and with regard to the regulation of their activities.

Principal Functions of Edge Act.

The Edge Act then is designed, in the first place, to perform a very distinct service in connection with our reconstruction work, by reason of the fact that it offers a means for providing long-term credits for our export trade. It represents a scheme whereby the large credit risks involved in export trade at the present time may be distributed by means of co-operation among

manufacturers, bankers and thousands of individual investors in such a way that our export trade may not languish.

A second function which the Edge Act is to perform consists in providing a new medium for handling foreign securities. Under the Edge Act banks may be organized along the lines of the British "investment trusts." The latter represent a financial institution known in European countries for more than fifty years.

Investment Trusts Important Feature in Foreign Finance.

The oldest known organization of this kind is the Societe Generale pour Favoriser l'Industrie Nationale of Brussels. It was established in 1822. In France, Germany and Switzerland similar concerns have long been considered important factors in the financial machinery of these countries. In Switzerland, particularly, as a neutral country, groups of international bankers have established several flourishing corporations of this type. England, however, with its vast colonial interests and world-wide financial ramifications is the classic home of the modern investment trusts. The Scottish-American Investment Company, dating back to 1860, has been the forerunner of many similar enterprises, numbering at the present time more than one hundred and fifty. They purchase securities from all parts of the world and have proved a great factor in educating the British investor to the value of foreign securities such as foreign government issues, municipal loans, mortgage bonds, shares in public utilities, banking, commercial and industrial corporations and railroads. The annual statements of some of them show upwards of three hundred different kinds of investments.

Of late years an increasing number of investment companies has been formed for the purpose of specializing along certain lines. Some hold foreign railway securities exclusively, others interest themselves solely in foreign rubber, metal, petroleum, electrical and like enterprises. Certain investment trusts are also members of underwriting syndicates. By means of the great diversification of their holdings the risk involved is lessened and

becomes more evenly distributed. The by-laws of many of these corporations do not allow more than five per cent. of their combined share and bond capital to be invested in any one particular kind of security.

American Investors Slow to Enter Foreign Field.

Foreign securities have, in the past, not been purchased very generally by American investors. A comparison of the financial columns of our leading daily newspapers with those of metropolitan dailies of Europe indicates the comparatively small number of foreign stocks and bonds and other securities quoted in our press, and reflects strikingly the lack of familiarity and apathy of our public in this respect. Apparently the main reason for this lies in the fact that our domestic market thus far has offered sufficient opportunities for profitable and safe investments right at home. As a matter of history, in Great Britain investments in foreign securities became popular only when the interests on British securities (consols) became so small as to make them unattractive.

Conditions Favor Broadening American Investment Market.

However, a gradual change has been taking place in the United States for some time. The broadening of our political, commercial and social interests with respect to foreign affairs, as a result of the world war, has had a marked effect upon the market for foreign securities in this country. The rapidly developing preponderance of our country among the commercial powers of the world, closer and more direct connections with foreign commercial and industrial enterprises through American branch banks, credit information services, shipping and other facilities, these and similar factors combine to make foreign securities a much safer and more desirable class of investment than formerly. Some of our large banking concerns and leading commercial and financial journals are doing much to educate the American public along these lines, by disseminating reliable information con-

cerning risks of available investments and relative to resources of foreign countries, as well as the political and economical condition of their people.

Already a number of banking concerns have been organized for developing a wider market for foreign securities in the United States. They unquestionably meet a need of our times and perform a useful function in our banking machinery.

Average American Investor Requires Guarantees.

However, the present disturbed economic conditions in foreign countries are not at all likely to promote widespread confidence in foreign investments among small American investors. The ordinary American investor is not in a position to observe political and industrial conditions in foreign countries at close range. He necessarily relies on the advice of others to guide him, and he wants to feel assured that his advisers are in a position to carefully examine foreign securities to be marketed here. To overcome his doubts he wants to have some sort of guarantee that good judgment, sound policies and supervision by some governmental agency shall stand between him and speculative high finance.

Edge Act Promotes Confidence.

The Edge Act is designed to furnish just these services. What banking concern can be in a better position to inspire confidence as to its policies than one operating under a federal charter and functioning in conformity with the rules and regulations established by the Federal Reserve Board under the powers given it by the Edge Act? Such a corporation will have a strong prestige to begin with, and its own debenture bonds will carry with them the guarantee of a sound and conservative banking enterprise that can not fail to appeal to the public.

Foreign investments offer much greater opportunities than domestic for swindling schemes. The history of investment trusts in Europe chronicles not a few cases of shady enterprises. In

more than one instance they were used as a vehicle by unscrupulous promoters and speculators to defraud a gullible public. The International Railway Bank of Berne is an example. Its activities became an international scandal.

The check exercised by the provisions of the Edge Act and through the Federal Reserve Board upon concerns subject to its jurisdiction should serve as a strong recommendation to careful investors and as an invaluable protection against unscrupulous speculation.

Edge Act Affords Efficient Service.

To sum up, the primary importance of the Edge Law corporations at the present time consists in the service they can render to the export trade of the United States by furnishing credit on the basis of foreign securities held by them.

The practical working out of this new trade machinery would be something like this: A large order for machinery is received by an export association of American manufacturers, say from Czecho Slovakia. The manufacturers, while willing to supply the goods, are not in a position to extend long-term credit. The foreign buyers, on the other hand, can not make cash payment, but offer first-class security in the form of government obligations, industrial stocks or loans, or even of mortgages on their plants, etc. A corporation organized under the Edge Law would be ready to finance the transaction. Upon careful investigation it finds the foreign securities offered safe and attractive, and accepts them. Against them it issues its own debentures, for which it develops a market in this country. American investors, relying on the reputation of the Edge Law bank, are glad to buy its paper. The American manufacturer in turn is furnished by the bank with the funds which he requires in payment for the machinery he is to deliver to the foreign buyer.

American Enterprises Abroad Require Domestic Financial Support.

American engineering concerns are called upon to undertake immense new projects in foreign countries, where large-scale

construction work was arrested during the world war. As a rule, undertakings of this kind become paying propositions only after a lapse of years. Investment in such enterprises in distant lands will hardly appeal to American investors who are not in a position to analyze and determine the merits and profitableness of the ventures. Here again the difficulty of raising the needed money to finance such undertakings may be obviated by availing oneself of the machinery of the Edge Law banks. If a corporation operating under that Act risks its capital in an enterprise, the prospective American investor may feel warranted in assuming that the particular proposition must have merit, and accordingly becomes willing to share in the risk.

Function of Edge Act Banks.

Supposing the foreign parties give their three or five-year notes with proper security. The Edge Law bank can take and guarantee them. In the absence of reliable information concerning the foreign concern's standing, American investors might hesitate to buy the notes. However, their interest and confidence might be won if an Edge Law bank would guarantee the notes under the supervision of the Federal Reserve Board.

Or the Edge Law bank may take the notes and issue its own debentures against them.

Another illustration of what may be done under the Edge Law, is the following: Buyers in foreign countries might agree to deposit currency of their own country in a branch of an Edge Law bank established in their country, and the Edge bank could draw bills or longer term notes against such deposits and market them in the United States. Thus exchange may be created without the transfer of gold or money.

What the Edge Law corporation does for the assumed export association of machinery manufacturers, it could do under like circumstances to finance American grain and flour to Poland, textiles to Austria, locomotives to Belgium, etc.

Organization of Premier American Export Trade Bank.¹

The first concern that has applied for a charter under the Edge Law is *The First Federal Foreign Banking Association*. The following statement concerning the new bank is taken from *Commerce and Finance*, April 21, 1920, page 556:

"It was organized under the leadership of Aldred & Co., of New York, with whom the following banks or financial houses are associated on behalf of manufacturers in their respective localities:

Bank of the Manhattan Co., The New York Trust Co., The Liberty National Bank, New York; Tucker, Anthony & Co., New York and Boston; Citizens Commercial Trust Co., Buffalo; American Trust Co., Boston; Merchants National Bank, Worcester; Chicopee National Bank, Springfield, Mass.; Commercial Trust Co., Philadelphia; The First Bridgeport National Bank, Bridgeport.

"W. S. Kies, of Aldred & Co., formerly vice-president of the National City Bank and the American International Corporation, will be chairman of the board. The president has not yet been chosen. The policy and management of the bank will be under the direct supervision of an advisory management committee composed of the chairman of the board and the following:

J. H. Perkins, Montgomery & Co., formerly executive manager of the National City Bank of New York; J. E. Gardin, chairman of the board, International Banking Corporation; J. H. Maxwell, vice-president, Liberty National Bank of New York, president, Warehouse Finance Corporation; F. H. Payne, Tucker, Anthony & Co., president, American Hardware Manufacturers' Association and Greenfield Tap and Die Corporation.

"In addition to the above, the first board of directors will include the following:

J. E. Aldred, Aldred & Co., chairman of Gillette Safety Razor Co., Consolidated Gas, Electric Light and Power Co. of Baltimore and Pennsylvania Water and Power Co., formerly chairman of the Merchants National Bank, New York; Stephen Baker, president, Bank of the Manhattan Co., New

¹See also p. 330.

York; Mortimer U. Buckner, president, New York Trust Co.; A. B. Chapin, vice-president, American Trust Co., Boston; U. P. Clement, president, Citizens Commercial Trust Co., Buffalo; F. A. Drury, president, Merchants National Bank, Worcester; H. J. Fuller, vice-president, Fairbanks, Morse & Co., president, E. & T. Fairbanks & Co., and Canada Carbide Sales Co.; Alba B. Johnson, formerly president Baldwin Locomotive Works, president Philadelphia and Pennsylvania Chambers of Commerce; R. E. Jones, first vice-president Bank of the Manhattan Co., formerly president of the Merchants National Bank; Walter B. Lasher, president American Chain Co., Inc., Weed Chain Tire Grip Co. and Pratt & Cady Co., Inc.; Geo A. McDonald, president Chicopee National Bank, Springfield; J. H. Mason, president Commercial Trust Co., Philadelphia; Edmund S. Wolfe, president First Bridgeport National Bank, secretary-treasurer American Fabrics Co., Bridgeport; W. L. Wright, president Savage Arms Corporation.

"The capital of the association will be \$2,100,000, evidenced by 21,000 shares of a par value of \$100 each. Of these shares 1,000 will be founders' or managers' shares. The stock has all been underwritten at \$105 a share and more will be publicly offered."

Edge Act Rounds Out Export Trade Law.

As will be seen from the foregoing, the Edge Act makes available new financial facilities for promoting American export trade which fit in with and complement the commercial advantages made possible under the Webb-Pomerene Law. Both laws jointly promise to be of special service in connection with the export trade of small manufacturers, who individually are unable to build up and maintain an export business of their own. One of the main purposes underlying the Webb-Pomerene Act is to help small manufacturers. But the present credit situation is likely to handicap just such co-operative export combinations of small producers. In their case, therefore, the Edge Act may be of a particularly helpful service, and make possible a continuance of trading relations which otherwise might fall a victim to the

disorganized credit conditions prevailing throughout the world at the present time.

Economic Conditions Dictate Course of Foreign Commerce.

Much has been said and written during the past five years in favor of American trade expansion to foreign countries. But popular enthusiasm has been considerably dampened recently on account of the enormous increase in commodity exports and their bearing on the high cost of living in the United States. In fact an unmistakable reaction has set in against export trade promotion.

Without attempting to go into the merits of this movement, the fact should be emphasized that our present exports reflect abnormal conditions. The enormous demand by European countries for foodstuffs and other commodities of which the war has stripped them, is bound to diminish in large measure sooner or later. When this happens, the full significance of our new export trade machinery, including commercial and financial co-operation, will make itself felt. Under normal conditions the export trade of the United States represents but a small part of our total commerce and trade. While the importance of our export business should not be overestimated, it nevertheless plays a very important role in the economic life of our nation. We need imports from foreign countries on a constantly increasing scale. The sound way to pay for commodities and services procured from abroad is through exports from our own country.

Exports Are Balance Wheel of National Trade.

It needs no elaborate argument to show that greater export trade means greater prosperity. This truth is of special significance to our people at the present time by reason of the fact that a steady flow of exports serves as an invaluable balance wheel for our domestic industry. As the process of readjustment and transition goes on, the need of keeping our factories running, our labor employed and our merchant marine moving

by directing our surplus production to foreign markets, is being recognized more and more by capital as well as labor. This fact of itself justifies a constructive and active export trade policy for our country. Unlike the numerous and elaborate post-war reconstruction programs, so widely advocated during the past two years, only to be discarded and forgotten in due course of time, the Webb-Pomerene and the Edge Acts are of more than temporary significance. Both measures are essentially constructive in scope, the first has already proved its usefulness. Neither of them offers a panacea. Both, however, represent new facilities for establishing and maintaining our export trade on a basis which many years of experience elsewhere have shown to be sound and serviceable. In proportion as the present state of flux in international trade shall give way to more stable and normal conditions, this new orientation of our foreign trade policy—co-operation for commercial purposes under the Webb-Pomerene Act, and for financial purposes under the Edge Act—bids fair to prove a source of strength and protection to the business interests of this country.

NOTE—The Second Federal Foreign Banking Association was formed in January, 1921, for the purpose of aiding the export of cotton. Its home office is in New Orleans and its capital stock is \$7,000,000.

At a meeting authorized by the American Bankers' Association, at Chicago, December 10 and 11, 1920, steps were taken for the organization of a third Edge law bank with a proposed capital of \$100,000,000. The capital of the proposed corporation was placed at that sum in order to give it the maximum financial ability of one billion one hundred million dollars.

CHAPTER XIX.

Synopsis of the Edge Law.¹

Let us now proceed with a synopsis of the Edge Law, leaving for final consideration further reference to the important function this useful measure is destined to exercise in the world of international finance.

Organization of Corporations Operating Under This Act.

Any number of persons, not less than five, may incorporate under the provisions of the statute. Unless sooner dissolved by consent of the stockholders or by operation of law, the life of the organization shall be twenty years, with renewal by consent of the Federal Reserve Board. Its name shall receive the approval of the Board; and it may insert in its franchise any provision not inconsistent with law.

Capital Stock and Dividends.

The amount of the capital stock cannot be less than \$2,000,000, which must be entirely paid up within twenty months—but the corporation can begin business when \$500,000 in cash is subscribed. Provision is made for increase or reduction of the capital stock; but the minimum of \$2,000,000 must be maintained and no dividends from capital are allowed. Ultimately, a 20 per cent. surplus from net proceeds shall be carried. At all times a majority of the shares of capital stock must be owned and held by (a) citizens of the United States; (b) corporations, the controlling interest in which is owned by citizens of the United States, chartered under Federal or State laws; or (c) firms or companies, the controlling interest in which is owned by citizens of the United States.

¹See Exhibit No. VIII p. 443.

National Banks May Purchase Stock.

It is lawful for any national bank to invest 10 per cent. of the bank's capital and surplus in one or more of such Edge Law corporations.

Directors.

Only citizens of the United States are empowered to occupy seats upon the Board of Directors. Members of the Federal Reserve Board may neither own stock nor serve as directors; but notwithstanding the prohibitions of the Clayton Act, directors of banks may be directors of Edge Law corporations—provided the bank is a subscriber to the capital stock and provided the Federal Reserve Board approves of such duplication of membership upon the several boards.

Liability of Stockholders, Officers and Directors

Liability (in contract to our national banks) is confined to the amount of unpaid subscriptions. Where illegal acts create liability upon the part of the corporation, each director and officer who participates in or assents to those illicit practices is subject to responsibility for the losses resulting therefrom, and the corporation may recoup itself from their individual resources. Even dissolution of the corporation does not release the officers or stockholders from any and all liabilities previously occurring in connection with the corporation's affairs.

General Powers

In addition to those administrative powers requisite for the orderly performance of its business, under regulations prescribed by the Federal Reserve Board, certain general banking powers are conferred as follows:

(1) To purchase, sell, discount and negotiate with or without indorsement or guaranty, negotiable instruments including cable transfers and other evidences of indebtedness.

(2) To deal in securities, including the obligations of the United States, or of any State but not including shares of stock, excepting within certain limits prescribed by law and by the requirements of the Federal Reserve Board.

(3) To accept bills and drafts drawn upon them, subject to certain limitations.

(4) To issue letters of credit.

(5) To purchase and sell coin, bullion and exchange.

(6) To borrow and lend money.

(7) To issue debentures, bonds and promissory notes, subject to certain general conditions and limitations laid down by the Federal Reserve Board; but in no event shall the total obligations exceed ten times the capital stock and surplus of the issuing corporations.

(8) To receive deposits outside the United States, and (as an incident to its foreign business) to accept deposits within said jurisdiction, but, where said domestic deposits are received, reserves amounting to at least 10 per cent. must be maintained.

(9) To exercise those incidental powers which in orderly banking are necessary or usual to carry out and give effect to the rights specifically granted by law.

Each of the foregoing list of nine general powers is subject to the right of the Federal Reserve Board to limit the aggregate amount of liabilities at any time outstanding in any or all of said classes of obligations.

Branches and Agencies May Be Established.

Under the regulations prescribed by the Federal Reserve Board, said corporations may maintain branches or agencies in foreign countries, and in the dependencies or insular possessions of the United States.

Power to Purchase and Hold Stock.

Provided the consent of the Federal Reserve Board is obtained, Edge Law corporations may purchase and hold shares of capital

stock in other corporations similarly incorporated under said statute; and under like permission, ownership may be had in stock of corporations not primarily engaged in commercial dealings within the United States. Fifteen per cent. of the capital and surplus may be invested in such a banking concern and ten per cent. may be invested in a commercial company; but the investment shall not exceed that percentage, excepting by special permission of the said Board; and shares of competing companies are rated as falling within said permissible percentage of ownership. However, said limitations do not apply where purchases of stock are necessary to secure liquidation of a debt; but such shares must be disposed of within six months, unless the time is extended by said Board.

Conversion of Institutions Operating under Federal or State Law.

Banking institutions operating under laws of the United States or of any individual state, and possessing the requisite capital (\$2,000,000) may become Edge Law corporations by vote of not less than two-thirds of the stockholders. In such event, the conversion and the name adopted by each newly instituted corporation shall be subject to approval by said Board. The shares of capital stock may continue as they existed prior to the conversion; while the directors may remain in office until others are appointed or elected, in accordance with the provisions of law.

Franchise—How Forfeited.

Either the Federal Reserve Board or the Attorney General of the United States is empowered to bring a proceeding to dissolve the corporation and to declare a forfeiture of its rights, privileges and franchises. Such proceedings shall be in the nature of a suit for the specific purpose brought in a proper Federal court; and said decree of forfeiture must be based upon proof of failure to comply with the provisions of law. Jurisdiction lies in the district or territory in which the home office of the corporation is located.

Insolvency and Receivership.

Should the Federal Reserve Board become convinced of the insolvency of any Edge Law corporation, the Board may appoint a receiver to take possession of all the corporate property and assets. The subsequent procedure is similar to the practice in the case of insolvent national banks, excepting that foreign assets are dealt with in accordance with the terms of the foreign laws applicable thereto.

Taxation.

Tax laws applicable to other corporations operating under the laws of the State in which the home office is located—are controlling in matters of tax-liability. In like manner, the shares of stock are subject to tax as personal property of the owners or holders to the same extent as shares of stock in similar State corporations are held to be taxable.

Penalties.

Fraudulent use of privileges of the corporation, embezzlement, making false entries, etc., are punishable by a fine of not to exceed \$5,000 and by imprisonment for a period of two to ten years.

Any statement by any person connected with an Edge Law corporation setting forth that the United States is liable for the payment of the bonds or other obligations of such corporation, or has in any manner guaranteed payment thereof, or is liable for any act or omission in connection with the operation of said corporation—creates individual liability to a fine of not more than \$10,000, and to imprisonment for not exceeding five years.

General View of After-War Finance.

Having completed our epitome of a most important statute, let us turn from the mention of this necessary but gruesome

element of imprisonment and fine; and supplement this fiscal excursion by a birdseye view of the entire field of finance, as it affects the United States after five years of wartime conditions.

Secretary of Treasury Predicts Steady Financial Recovery.

In his recent report, Mr. Houston, the Secretary of the Treasury, undertakes to dispel financial gloom by announcing that the situation is improving, and the minds of men are tending toward renewed confidence and greater energy. Surrounded by such hopeful elements, mankind may look forward to dispersion of the pending clouds of doubt and despondency, within a reasonable period. This indeed is a message of cheer for the citizens of the American Republic, seeing that our Federal Commonwealth, since the armistice was signed, has advanced \$4,000,000,000 (approximately \$9,000,000,000 in all) to Europe to furnish the supplies of food and material those war-racked countries require as an aid to restoration of normal life.

Remarks by Governor of Reserve Board.

We are fortunate in having at command another document of supreme importance and value, at this juncture. The Hon. W. G. P. Harding, Governor of the Federal Reserve Board, delivered before the Second Pan-American Financial Congress during its session in Washington, January 23, 1920, an address upon "The Problems of the United States as a Creditor Nation." We shall avail ourselves of some ideas which seem especially applicable to the subject now before us.

United States Becomes Creditor Nation.

From this official source we learn that prior to the outbreak of hostilities in August, 1914, the United States stood indebted to Europe in the sum of \$5,000,000,000, represented in large measure by securities of Federal and State governments, and of

our municipalities. As the war progressed, exports of food-stuffs and munitions mounted to unheard-of totals; and early in the year 1917 it became evident this pre-war debt had been entirely wiped out, and the United States had become a creditor nation to the extent of two billion dollars. Today this credit-balance stands approximately at fourteen billion dollars, including in this grand total ten billions of dollars advanced by our government to foreign nations associated with us in the war. That this balance was not gained without effort and liberal expenditures of public funds is indicated by the fact that the equipment and maintenance of our military and naval establishments has cost perhaps fifteen billions of American money.

Domestic Debt Has Vastly Increased.

If we turn aside from our relations with foreign affairs and take an inventory of our own estate, we find the modest 1914 debt of one billion dollars has grown into a vast public obligation approaching in amount twenty-five billion dollars. Within the same time the annual budget has grown from twelve hundred million dollars to a point where four times that sum must be provided to meet the yearly needs of government. Interest payments arising from loans to other nations as yet are negligible quantities; and the United States must look to its own citizens for the revenue required to pay its current bills.

Problems Involved in Present-Day American Finance.

A moment's reflection—after we have recovered from the shock of trying to think in terms of billions—will suffice to show to our minds the results that flow from America's present-day situation:

First: Commerce must be maintained at a high level of productive efficiency, in order to create the balance of new wealth, from which a tax-fund sufficient to liquidate these public demands can be collected, without frightening capital or discouraging thrift; and—

Second: In order to attract and retain foreign traffic in American materials and wares, fiscal institutions must be provided where customers can obtain long-time credits. In Europe, the exigencies of the war have made extended payments the essential element even in quarters where credit formerly was neither expected nor desired; while in other quarters, i. e., in South and Central America, Africa, China, Japan and in all backward nations—cash payment is a thing almost unknown. It is seen, accordingly, that America must assume the burden of financing its foreign customers by a system of deferred payments; but how can this be accomplished without loading up our banks with long-time commercial paper or with securities of a nature even more future-looking? This indeed is a great and a serious problem; but it is one that must somehow be solved. It is the "white man's burden" that attends America's entrance into the sphere of world trade.

Solution is Offered.

Fortunately for both buyer and seller, the problem is capable of solution; and the answer put forth by Congress has taken shape in the Edge Law. It is the concrete response by the bankers and business men of America; and it meets the requirements of the situation in both particulars:

First: It enables our manufacturers and merchants to discount their foreign accounts, and to use the proceeds in completing contracts and taking on new business; and,

Second: It enables our national and state banks to club together and organize in conjunction institutions specially adapted to finance our export trade, without loading down our Federal and other banks with long-time obligations that could not readily be converted into cash, in time of financial uncertainty and distrust, i. e., in seasons when only actual dollars or their equivalent really count in bank-assets.

Edge Law Coordinates Investing Classes.

Senator Edge is entitled to great credit for his insight into the true nature of the condition which confronts the financial

world in these after-war days, as well as for his sagacity and persistence in formulating and pushing through a measure so full of promise of relief by proper and adequate means. Five Liberty loans have accustomed the American people to conservation by saving and investment; and through the simple device of transforming these investors into purchasers of debenture bonds backed by ample security in way of long-time commercial paper and by other collateral obtained in due course of foreign trade—an almost exhaustless fund of current money is made available in this critical moment of reconstruction of world-commerce. Like farm-loan bonds, these securities possess the intrinsic merit of being issued under Governmental authority, with official supervision by the Federal Reserve Board at every subsequent stage of their existence. Even though such securities do not advance the whole way and rank with government bonds by affording to owners and holders the additional advantage of national endorsement and ultimate payment out of public funds, they certainly do constitute a very high class of conservative investments; and their market value should reflect this favorable element, in competition with ordinary types of stocks and bonds.

CHAPTER XX.

Rules and Regulations of the Federal Reserve Board Governing the Procedure of Banking Corporations Organized Under the Edge Law.

The rules and regulations relating to the organization and operation of banking corporations organized under the provisions of Section 25 (a) of the Federal Reserve Act, viz., under the Edge Law, are printed in full in Appendix, Exhibit 9.

Reserve Act Permits Limited Foreign Banking Activity.

As far back as September 6, 1916, Congress, in Section 25 of the Reserve Act, granted authorization to national banks with capital and surplus exceeding \$1,000,000 to invest to a limited extent in the stocks of domestic corporations principally engaged in international or foreign banking; but in the absence of legislation permitting the formation of such corporations under Federal charters, our national banks could only purchase stocks in state-chartered corporations operating mainly in New York and intended to obtain a share in the world's dealings in acceptances and other forms of exchange. Except in pre-war Germany and to a limited extent in other commercial countries, this business has continued almost exclusively a feature of London's financial section, where it is conducted by long established and very strongly organized bodies locally styled "trusts." The tolls collected for such fiscal services form a considerable factor in England's "invisible exports" which comprise among other items insurance in various forms, interest upon loans, freight upon overseas shipping; and, in the aggregate, the revenues thus derived greatly exceed the balance of import trade, and serve to materially enhance the national wealth of the United Kingdom.

Edge Act Grants Autonomy With Extensive Powers.

When the problems of post-wartime legislation in large measure had been disposed of, and Congress was at liberty to deal with private interests desirous of engaging in international finance, the Edge Law was enacted (December 24, 1919), prescribing a method for the incorporation of foreign banking companies under Federal charters, and materially extending the powers conferred under the Federal Reserve Act of 1916. To the Federal Reserve Board was relegated the duty and responsibility of providing suitable rules and regulations, which appear upon page 454 and to which reference should be made in connection with these comments.

In this Chapter the word "Board" relates to the Federal Reserve Board.

Wherever reference is made to a corporation organized under the Edge Law (Section 25 (a) of the Federal Reserve Act)—the word "Corporation" will be spelled with a capital "C."

RULES AND REGULATIONS.

FORMATION OF CORPORATION.

Five or More Individuals May Organize.

The organization can be effected by any number of natural persons, not less than five.

Articles of Association.

The organizing members may adopt Articles of Association upon Federal Reserve Form 151 (see page 477), and they are at liberty to add any other provision which does not conflict with law. Each member signs the Articles, which are then forwarded to the office of the Federal Reserve Board, where the paper is placed on file.

Organization Certificate.

An Organization Certificate is next required, which must be executed upon Form 152 (page 480). The name assumed by the

Corporation, the place or places where its operations are to be carried on and sundry other particular items of information must be set forth under the hands of the organizers (for specific items, see Section 3 of Regulations). The paper must contain a certificate of acknowledgment, and when duly executed, should be forwarded to the Board for its files.

Special Requirements Control Selection of Name.

Owing to the importance of preventing duplication of names, a preliminary application should be made for the reservation of the title selected for the proposed organization; and a special form, No. 150, page 476, is provided for this purpose. Upon receipt of this paper, the Board will reserve the name selected, for a period of 30 days, while passing upon the suitability of the title. No foreign trade banking corporation organized under Section 25 (a) is authorized to employ the word "Federal," where the word "bank" appears as a part of the title. A further requirement negating the right to employ the term "bank" in cases where the corporation issues its own bonds, debentures or other like obligations, calls for more than passing notice and for some explanation. This distinction and special limitation is due to the basic banking principle that banks of deposit are under primary obligation to hold their corporate funds and current moneys intact and free from entangling obligations, in order that the cheques and other forms of demands by customers may be met when due. Bonds, debentures and acceptances when issued by the corporation direct and not dealt in as a matter of purchase and investment, are a paramount obligation upon the financial resources which should be reserved for depositors and customers of that unsecured class; hence it follows that a financial institution engaged in discounts and guarantees of general finance is a broker and dealer in discounts and exchange rather than a conventional "bank"; and the public should be protected from the use of the term "bank" where commissions and discounts, and not the handling of deposits, is the principal source of revenue and the main object in view.

The distinction here noted occupies a prominent place in these Rules and Regulations; and it will be again referred to as this banking principle is from time to time applied therein.

Final Steps Antecedent to Engaging in Business.

When these preliminaries have been completed, the association becomes a body corporate and is possessed of corporate powers; but these powers are suspended until the corporation has secured from the Board a written authority to commence business. The president or cashier and three members of the Board of Directors must execute and file a certificate signed by them, setting forth:

- (a) That each director is a citizen of the United States;
- (b) That a majority of the shares of capital stock is owned by persons or interests owing allegiance to the United States;
- (c) That the initial payment, 25%, upon the authorized capital stock, has been made pursuant to law. Later payments will be the subject of certification by the cashier, as and when they are made in regular course.

CAPITAL STOCK AND TRANSFER THEREOF.

Amount and Nature of Stock.

A minimum of stock, \$2,000,000, is specified in the statute. The Regulations prescribe that the Articles of Incorporation must set forth the par value of the individual share, with a clear description of the nature, obligations, rights and principles appertaining thereto, to the end that every stockholder shall possess due and complete information. Stocks of no par value are prohibited.

Reason for Safeguarding Transfer of Stock.

The subject of transfers of stock is dealt with very minutely in the Regulations. This elaborate provision is necessary to insure that the majority at all times shall be owned by citizens

of the United States. The requirements cover acquisition of capital stock by individuals, corporations, firms or companies. Every application for the issue or transfer of shares must be accompanied by affidavits proving the citizenship, etc., of the applicant; and no shares shall be issued or transferred except upon the books of the Company.

Stockholding Based Upon Citizenship.

Where the holder of shares ceases to be a citizen or becomes subject to control by foreign interests, two months of "grace" are allotted for transfer to a qualified owner; and ownership of the shares confers no right of vote after notice by the directors that such transfer is required. The by-laws must contain provisions regulating the registration of shares of stock in a manner calculated to insure ownership by persons, corporations or firms owing allegiance to the United States; and appropriate words explanatory of the nature and effect of these requirements as to ownership, must be contained in each certificate of stock.

OPERATIONS—WHERE CARRIED ON.

Only business incidental to international or foreign transactions shall be conducted in the United States. Agencies may, however, be established within the home jurisdiction, with the consent and approval of the Board; but these agencies must be conducted for and confined to certain specified purposes. No branches shall be established in the United States; but branches may be established elsewhere, with the consent of the Board.

INVESTMENT IN THE STOCKS OF OTHER CORPORATIONS.

Regulations Prescribe Extent of Corporate Stock Ownership.

In furtherance of the obvious purpose of the authorization and creation of the Corporation, wide power and scope on in-

vestment in the securities of other corporations is permitted. Such ownership, however, is prohibited in cases where the other corporation is engaged in traffic within the United States, or is otherwise operating in the home jurisdiction, except as an incident to its international or foreign business. Ownership in shares of other Edge Law Banking Business Corporations is permitted, where those corporations are not in substantial competition with the acquiring corporation, either directly or by holdings of stock in corporations that do actively compete. The limit of ownership is fixed at 15% of the capital and surplus of the purchasing corporation, when the stock-issue pertains to a banking corporation; while only 10% is permitted to be invested in the shares of a corporation of the non-banking description. This restriction does not, however, prevent unlimited holdings in the shares of a corporation organized under foreign laws, since the laws of the foreign jurisdiction prevail and regulate the situation in those instances.

ISSUES OF DEBENTURES, BONDS AND PROMISSORY NOTES; SALES OF
FOREIGN SECURITIES; ACCEPTANCES.

Securities Extending Beyond One Year Require Approval.

Excepting notes issued by the Corporation in borrowing from banks or bankers for temporary purposes not to exceed one year—issues of debentures, bonds, notes, or other obligations require the prior sanction of the Board. Such approval extends only to the advisability of those proposed issues of securities, when considered in connection with the general character and scope of the business; and the investigation will be directed mainly to the *amount* of those securities which should be issued under the circumstances thus disclosed. Only to that extent does the Board's inspection and approval relate to the merits of the obligations as an investment; and there is a strict prohibition of all advertising or announcements representing that official approval has been obtained—since the investment value is not directly concerned, and the public might be misled by designing or careless

persons. However, it is more than probable the Board will exercise its discretionary power broadly, in the public interest; for issues of securities based upon cheap foreign bonds of doubtful value—and similar transactions—should be made difficult or altogether prohibited at their very inception. Accordingly, under this provision applications for permission to institute issues of corporate obligations must contain a statement of the condition of the Corporation; a detailed list of the securities which compose the underlying collateral, with particulars as to maturities, etc.; and such other data as the Board may from time to time require.

Domestic Sale of Foreign Securities Scrutinized.

Similar regulatory requirements as to the sale of foreign securities are prescribed in the public interest; and formal application must be made and the Board's approval secured, as a condition precedent to such disposal of foreign securities in our domestic markets.

Issuance of and Dealings in Acceptances Regulated.

It is not unlikely dealings in acceptances will constitute, in numerous instances, the principal business of the Corporation; consequently, the provision of the Regulations dealing with those obligations have special importance here. It should be noted that the Corporation is privileged to "accept" drafts and bills of exchange growing out of the importation or exportation of goods; but it should also be noted the right to deal in acceptances exists only where the Corporation has no outstanding debentures, bonds or other such obligations issued by the Corporation. Where obligations of such a nature exist, the consent of the Board must first be obtained upon formal application; and this consent may be qualified, and the volume of acceptances confined within prescribed limitations. This requirement is in accordance with the provision previously noted (page 342), that a Corporation is prohibited from acting in a dual capacity, (a) as a bank of deposit, and (b) as a medium of discount and a guarantor of bonds and other securities. Duplication of obliga-

tions based upon a single fund, is present in equal measure in both instances; and sound banking demands that a new foundation for payment must be created where a second contingency is created—one that may absorb the entire fund, when the date for liquidation arrives. In London financial circles, acceptances usually mature in 90 days; so that limitation to a six months period seems entirely reasonable. As to the limitations upon the amount of the acceptances that may be outstanding, no drawer shall be accorded accommodation in an amount aggregating at any time in excess of 10% of the subscribed capital and surplus of the Corporation, without (a) supplying full security; or (b) where the transaction represents an exportation or importation of commodities and is guaranteed by a responsible bank or banker. As to aggregate volume of acceptances, any of the following items of assets will be approved: Cash, 50% of all amounts in excess of the subscribed capital and surplus must be fully secured; or where twice the amount of the subscribed capital and surplus is exceeded, all the acceptances in addition thereto must be fully secured by collateral. (With respect to the last-named situations, the Corporation shall elect which requirement calls for the smaller amount of secured acceptances.)

Extent and Nature of Reserves Prescribed.

Reserves to the extent of at least 15% are called for, as against any and all acceptances maturing in 30 days or less; as against acceptances maturing in more than 30 days, a reserve of 3% will suffice. Such reserves must be in liquid form; and balances with other banks, bankers' acceptances and such other securities as may from time to time receive the approval of the Board.

DEPOSITS.

Deposits Must Relate to Foreign Trade Enterprises.

Domestic deposits are strictly restricted to matters pertaining to transactions in foreign countries or in dependencies of the

United States where the Corporation has established agencies or branches, or where it operates through the ownership or control of subsidiary corporations. Where these requirements are fully complied with, time deposits or deposits on demand may be made by individuals, firms, banks or other corporations, whether domestic or foreign.

Foreign Deposits Unlimited Unless Corporate Issues Interfere.

Outside of the United States, deposits of any kind may be received; with the proviso, however, that where the Corporation has outstanding issues of bonds, debentures or other like obligations, deposits are limited to such deposits as are incidental to those issues. The principle of sound banking already referred to in this Chapter, applies with equal force in this situation; and demands this precautionary provision.

Reserves at Home and Abroad.

Reserves of at least 13% must be maintained against all deposits received in the United States; such reserves must consist of (a) cash in vault, (b) balance with Federal Reserve Bank of the district in which the head office of the Corporation is located, or (c) a balance with any member bank.

Against all deposits received abroad, such reserves shall be maintained as meet the requirements of local laws and the dictates of sound business judgment and banking principles.

GENERAL LIMITATIONS AND RESTRICTIONS.

Limitations Upon Loans.

No person, firm or corporation (including in the term "firm" the several members thereof), shall at any time borrow from a Corporation money in excess of 10% of the subscribed capital and surplus, except with the approval of the Board; but (a) discounts of bills of exchange properly drawn against actually existing values, and (b) the discount of commercial or business

paper actually owned by the person negotiating same—shall not be computed as “borrowed money,” within the meaning of this provision. Likewise, the term “borrowed money” does not here include acceptances, unless or until (a) such customer fails to provide the Corporation with a fund to cover the payment of the acceptance at maturity, or (b) the acceptance is held by the Corporation itself.

Maximum of Liabilities Prescribed.

With respect to the aggregate liabilities of the Corporation, the total amount of acceptances, average deposits (both domestic and foreign), debentures, bonds, notes, guaranties, indorsements and other similar obligations shall not at any one time exceed *ten times* the amount of the Corporation’s subscribed capital and surplus, excepting where the Corporation has obtained the consent and approval of the Board. This provision, however, does not include within its requirements, i. e., it is not necessary to compute and insert the value of—indorsements of bills of exchange having not more than six months to run, when drawn and accepted by others than the Corporation itself.

Abroad, Foreign Laws and Banking Principles Prevail.

In its operations abroad, a Corporation must be guided by the laws of the country where it is operating and by sound business judgment and banking principles. In those banking and other financial operations, the Corporation may exercise such local rights and privileges as are customary in the several jurisdictions where it transacts business in addition to the rights and privileges set forth in the Law and in these Regulations; and the Board may from time to time determine the nature and extent of those incidental powers which local laws and customs confer.

MANAGEMENT, REPORTS AND EXAMINATIONS.

AMENDMENT TO REGULATIONS.

In the exercise of their rights and the performance of their duties, directors, officers and employees shall be guided by the

letter and spirit of the Law and of these Regulations. Acts of omission or commission on the part of any persons holding such executive offices or thus employed carry with them responsibility on the part of the Corporation. When acting upon any application made under the provision of these Regulations, the character of the management and the general attitude displayed toward the purpose and spirit of this important statute, will be a factor which will be given proper weight and influence, when determining the merits of the application.

Each year at least two reports shall be made to the Board at such times and in such forms as the Board may require; and at least one official examination shall be made by examiners appointed by the Board—at the cost, however, of the Corporation thus examined.

These regulations may be amended from time to time; but such changes shall not prejudice obligations undertaken in good faith under those regulations actually in force at the time those obligations were assumed.

GENERAL REMARKS.

This epitome of the regulations is presented as an outline of the official text, with such comments and suggestions as appear pertinent and helpful. It will be extremely unwise, however, for the reader to undertake any business step in matters connected with an Edge Law Corporation, without referring to the official language comprised in the Regulations themselves. With the best intentions, errors and mistakes of omission and commission will creep into the annotated version. Infallibility of judgment is an extremely uncommon gift. Opinions differ as to the value of comments, or as to correctness of conclusions drawn; and the reader may be right in his individual interpretation, where it conflicts with our version of the official text.

PART SIX

COMPACTS IN WORLD COMMERCE

CHAPTER XXI.

International Agreements in the Form of Cartels, Syndicates and Other Combinations.¹

Monopolistic agreements and combinations no longer halt at the frontier of nations. With the internationalization of capital they have begun to reach out to all parts of the world, and to spin their network of threads from country to country. The decade preceding the world war was characterized by the growth of international private commercial agreements, commonly known as international cartels.

International Cartels Presuppose Domestic Market Control.

Agreements or understandings between individuals and associations or combinations in two or more foreign countries have not been as rare in the combination and trust movement as is generally supposed to be the case. But the great number of divergent factors which interplay in world trade, including shifting political conditions, endangers the stability of agreements and combinations of this kind, and have in the past been the cause of frequent changes in organization and of numerous dissolutions. Experience shows that international agreements proved successful only when the domestic industries in the different member countries had been organized previously. Strong domestic competition and the presence of powerful outsiders at home rendered futile a coming together of a few concerns, who were unable to control their own domestic market, with foreign concerns in the form of an international agreement. For the reason that many international cartels were short-lived, but chiefly because in certain countries they were unlawful, a considerable degree of secrecy has surrounded them. This explains why our economic literature offers but meagre information on

¹See *Journal of Political Economy*, Oct., 1920, pp. 658-679.

this subject. Then too, international cartels have been formed in larger numbers only since the beginning of the twentieth century.

Subject Presents Questions of Prime Importance.

For a number of reasons special significance attaches to a study of these international combinations. In the first place, from the viewpoint of the theory of cartels, the pure cartel concepts find a clearer expression in international than in national cartels, because the latter are more susceptible to the contingencies of legislation, local conditions, etc. Moreover, a consideration of the formation of international cartels, of the forces which produce them, their frequency, operation and effects has an important bearing on the question of the relation between cartels and protective tariffs. Finally, the economic changes brought about by the world war, among them intensified nationalism, internationalized capitalism, expansion of domestic industry and commerce in the form of "war industries" and new competitive industries, the promotion of foreign trade—lend an added interest to our problem.

Number and Nature of International Cartels.

Prior to the war there were known to be one hundred and fourteen international cartels in existence,¹ distributed among the different industries as follows: Transportation, eighteen; coal, ores, metals, twenty-six; stones and earth, six; electrical industry, five; chemical and allied industries, nineteen; textiles, fifteen; stoneware and porcelain, eight; paper, seven; and miscellaneous, ten. In upwards of a dozen of these private commercial alliances, American interests were parties to the agreements, some of which formed a network extending over the whole world.

Control of Home Market is Dominating Factor.

The primary purpose underlying most of them was the preservation of an undisputed internal market. To this end a delimita-

¹B. Harms: *Probleme der Weltwirtschaft*, 1912. p. 250 ff.

tion or division of sales territory was agreed upon. Regulation of prices was another important purpose, and in a number of instances price cutting and underselling was successfully suppressed. The majority of international cartels formed in Europe were organized for regulating prices, credit terms, packing regulations and selling practices generally. In other cases an exchange of patents or of technical processes was agreed upon, while still others provided for elimination of unprofitable lines of manufactures and restriction to certain standard sizes, grades, qualities, etc. The shutting-down of certain inefficient plants, merging of others and centering manufacture of special lines of goods in selected plants constituted further results of concerted action along international lines. Finally, curtailment of overproduction and joint purchase of raw materials or of supplies in general formed the basis of such commercial ententes.

Originating Causes Explained.

The conditions which make possible and give rise to international cartels depend on a number of factors. Of primary importance are the presence of international competition and the possibility of controlling the same. These occur most freely in the sphere of transportation and especially in ocean shipping. From the statement given above it will be seen that the largest number of international cartels related to transportation.

Industries located close to foreign territory and whose products are bulky and of comparatively small value are more likely to suffer at the hands of foreign competitors located near by than from domestic competitors far away. A situation of this kind led to the formation of a number of international cement cartels.

It sometimes happens that an industry producing a specialty becomes localized near the boundary of two or more countries on account of the presence of water-power, the proximity of raw materials or for some other reason. Within a limited geographical area manufacturing concerns of different nationalities grow up as competitors. Under such circumstances those who control

the plants are constantly brought personally into contact with one another in business and social life. A certain community of interest is likely to develop which readily leads to some scheme of co-operation to prevent a competition that impoverishes all concerned. Several combinations comprising French and Belgian, French and Swiss, German, Austrian and Swiss concerns were formed as a result of such industrial localization.

A similar *raison d'être* is given in the case of combinations which are representative of special industries in individual countries. Thus international agreements as to prices, credit terms, styles, etc., have been made which link together manufacturers of certain lines of textiles, silks, plushes, etc.

Control of Raw Materials Accelerates World Trusts.

Experience has shown that international co-operation is readily accomplished in industries where production rests upon a monopoly of raw materials, of patents or of process of manufacture. Numerous international cartels have been formed on the basis of such monopoly rights in the chemical, electro-technical, metal, petroleum and other industries. Considerable secrecy surrounds particularly agreements which provide for the suppression or the non-working of patents, and much criticism has been leveled at that practice. One of the largest international cartels, the International Federation of Bottle Factories, which was organized on November 15, 1907, had for its chief object the joint use of the so-called Owens' patents.

Compact Frequently Eliminates Competition in Export Trade.

Not a few international agreements cover the export trade of their respective members. Cartels of this kind usually apportion spheres of interest and seek to suppress competition among their members in foreign markets. The highest development of this type of international cartels consists in the operation of a central export office which serves as a joint selling agency. Individual members are not permitted to sell directly to foreign customers, but are required to market their export sales exclusively through the export office. In some cases a separate

company or corporation was formed for this purpose. Generally, however, the export office was affiliated with some large member concern. Thus a London concern served as selling agent for the International Lead Cartel.

International Cartels Include Agreements Between Buyers.

Over against combinations of producers there are also international buyers' combines. Their number had increased from year to year prior to the world war. The economies of joint purchase of raw materials and semi-manufactured goods are of particular importance where their source of supply is limited to some overseas country and where manipulations by middlemen may give rise to sharp price fluctuations. The International Borax Cartel, for example, operated a central purchasing office in London, the Borax Consolidated Co., Ltd., through which all the members were under contract to purchase their supplies of raw materials. Other international buyers' cartels operated at one time or another in the leather and rubber industries.

American Interests Parties to World-Trade Agreements.

In the following brief mention is made of some of the most typical examples of international combinations, chiefly where American interests were parties to the agreements. American concerns participated for a longer or shorter period in international agreements covering the following industries: Steel, tobacco, aluminum, powder, sulphur, petroleum, borax, shipping and several others.

International Railmakers Pool Interests.

An international association of railmakers was formed in 1884 by British, German and Belgian manufacturers who engaged in export trade at that time. The object of the international agreement was to divide all export orders for steel rails, each national group undertaking not to quote on products to be used in the

sidary agreements the following British lines: Allen, Dominion, White Star, Anchor and Cunard; also the American Line; the Red Star Line, a Belgian corporation; the Canadian Pacific Line; the Hamburg-American Line and the North German Lloyd Line, both German corporations; the Holland-America Line; and the Russian-America Line, a Russian corporation. The main provisions of the principal agreement comprised the following points:¹ (1) The steerage traffic between European ports and the United States and Canada, except Mediterranean passengers, was apportioned on the basis of definite percentages; (2) Any line exceeding its allotment must pay into the pool a compensation of 4 pounds for each excess passenger; (3) Weekly reports to the secretary of the steerage traffic handled; (4) In case any line exceeds its allotment a majority of the lines representing 75 per cent. of the pool shares can immediately order rates on a plus line to be raised or rates on a minus line to be lowered; (5) Steerage rates shall not be changed by any member line without previous notification of the secretary; (6) Members shall not issue publicity matter detrimental to other members; (7) Obligatory deposit with the secretary of a promissory note of 1,000 pounds, by each member line for each per cent. of traffic allotted to it in the pool, from which amount penalties may be collected; (8) Regular meetings were to be held alternatively at London and Cologne.

Tobacco Agreement Adjusts Trade Dispute.

The International Tobacco Agreement, made in 1902, comprised leading American and British tobacco interests. It grew out of efforts of the American Tobacco Company to invade the British market through Ogden's, Ltd., a large tobacco concern of Liverpool. To offset this growing American competition thirteen British tobacco manufacturers combined as the Imperial Tobacco Company, Ltd., and entered into a severe competitive struggle with the American Tobacco Company. A peaceful set-

¹See *United States v. Hamburg-American Co.* (239 U. S. 466 ff.)

tlement was finally reached in the form of an alliance based upon two agreements for division of business between themselves throughout the entire world. One of these agreements¹ provided for the organization of a new corporation, the British-American Tobacco Company, which was to have control of the world's tobacco markets outside of the United Kingdom and the United States. To the British-American Company was also turned over control of the George A. Jasmatzi Company of Dresden, a German branch of the American interests and of W. D. and H. O. Wills, Ltd., an Australian branch of the Imperial concern. The other agreement² provided for the transfer of Ogden's, Ltd., to the Imperial Tobacco Company, and for division of territory between the Imperial and the American Tobacco Company. The Imperial Tobacco Company agreed not to engage in the tobacco business in the United States, unless through or in connection with the American Company and its allies, except that it retained the right to buy and treat tobacco leaf in the United States for the purposes of its business in the United Kingdom. In return the American parties to the agreement bound themselves not to carry on the tobacco business in Great Britain.

Combine of Producers of Explosives.

An important agreement was made in 1897 between ten American manufacturers of explosives and the German and British powder syndicates. It is known as the International Powder Agreement³ and covered the production and distribution of detonators, black powder, smokeless sporting powder, smokeless military powder and high explosives of all kinds. Under the terms of the agreement certain European concerns agreed to abandon plans for erecting and completing detonator works in the United States, while the American members undertook to reimburse them for expenses incurred in connection with those plants, at the same time agreeing annually to purchase certain

¹See Exhibit No. XIX, p. 516.

²See Exhibit No. XX, p. 524.

³See Exhibit No. 21, p. 534.

quantities of detonators at fixed prices from the European factories. Both parties bound themselves not to erect factories in each other's territory and not to underbid each other in connection with government contracts. The different world markets were divided up and an understanding regarding basic selling prices was reached. A "common syndicate fund" for the purpose of protecting the common interests against outside competition was also provided for. The agreement was made for a period of ten years.

Producers of Aluminum Combine in World Trade.

The former International Aluminum Syndicate represented an international combination whose strength rested largely on a joint working agreement relative to the Heroult patents. It was organized in 1901, and comprised French, British, Swiss and American producing concerns. Under the terms of the cartel agreement a certain sales territory was allotted to each member concern. The American company obligated itself to market its European allotment through the central office of the syndicate which was located abroad. The European members, on the other hand, agreed to remain out of the American market. The various European markets were divided up among the different members of the syndicate, and maximum sales prices were fixed for each European market. The syndicate was dissolved on September 30, 1908. A new agreement¹ was made on September 25, 1908, between the Societe Anonyme pour l'Industrie de l'Aluminum of Neuhausen and the Northern Aluminum Co., Ltd. This new agreement allotted the total deliveries as follows: European market, 75 per cent. to A. J. A. G., 25 per cent. to N. A. Co.; American market, 25 per cent. to A. J. A. G., 75 per cent. to N. A. Co.; Common market, 50 per cent. to A. J. A. G., 50 per cent. to N. A. Co. This agreement was dissolved by a consent decree following prosecution under the Sherman Act in the District Court for the Western District of Pennsylvania on June 7, 1912.

¹See Exhibit No. 22, p. 541.

Glass Syndicates Limit Production.

The glass industry apparently lends itself readily to syndication and several international cartel agreements have been arranged in the past. In 1904 the Convention Internationale des Glaceries was formed which represented about one-half of the world's production of plate-glass. The agreement was renewed in 1909 for a further period of five years. Belgian influence dominated the syndicate, having control of about one-fourth of the total production of the plants belonging to the international syndicate. Besides the Belgian plants, German, French, Dutch, Austrian and Italian plants were members of the combination, which numbered altogether twenty-five plate-glass works. One of the chief purposes of the combination was to prevent overproduction. To attain this end, the agreement provided for certain periods during which the grinding machines were not allowed to operate.

Bottle Makers Control European Trade Through Patents.

The International Glass Bottle Association, organized in 1907, was formed principally for the purpose of buying up the Owen's patent rights. By acquiring the right to work the patents on the Owen's machine, an automatic bottle-making machine, which greatly reduced the cost of manufacture, the syndicate succeeded in making the transition from the old glass-blowing to the machine manufacturing stage of production, fraught with less hardships to employers as well as employed than might otherwise have been possible. The expense of acquiring the working rights to the patents, amounting to \$3,000,000, and of passing from one industrial stage to another were met satisfactorily by means of a stabilized price policy. Under the international cartel agreement the production of bottles was apportioned as follows: Belgium, 1,250,000 bottles; Austria, 16,000,000; Netherlands, 7,000,000; Sweden and Norway, 3,200,000; Denmark, 2,400,000; Germany, 53,000,000; England, 30,500,000; France, 29,500,000. Sir Leo Chiozza Money writes in *The Observer* (London) of March 7, 1920, regarding this combine as follows:

"Before the war there was a British bottle combine consisting of the chief firms in the trade, which had a working arrangement with the continental bottle combine. Between them they regulated output and maintained prices in spite of improvements in machinery. Great pressure was put upon independent firms to force them into the combination. One of the free firms wrote to me in 1910 that "the combine has several times approached the outside firms with the idea of persuading them to join, and owing to their refusal has twice reduced prices, to compel them to either lose money, shut down or join the combine." The continental arrangement was ended by the war, but it is only one example of many that could be given to show how the trust can reach across political boundary lines and rise superior to such trifles as fiscal policy. When arrangements are made between trusts in countries A, B and C, to delimit competitive boundaries and to settle at what prices goods shall be sold in each country, the political boundary line ceases to be a bar to monopolistic operations. In this, as in other matters, however, combines probably build greater than they know. Just as in its domestic aspect the combine functions to consolidate industries and to shape them into forms capable of further development, so international trust operations may in the long run help us to wider ideas of world commerce."

Mutual Understanding Between Producers of Sulphur.

An agreement between Italian and American sulphur interests is said to have been made in 1906 by the Union Sulphur Company of Louisiana and the Compulsory Sulphur Syndicate of Sicily.¹ Large over-production and American competition brought on a crisis in the sulphur industry of Italy in 1905. To remedy the situation, a law was enacted providing for the compulsory syndication of the sulphur industry of Sicily, and under a secret agreement said to have been reached with the American producers the latter agreed to keep out of the European markets, and in turn the Italian interests were not to ship sulphur to the United States.

¹La Riforma Sociale, 1919, p. 728.

War Disrupts Numerous International Cartels.

One of the economic effects of the world war has been the disruption of most of the international cartels and agreements in which German interests were represented, or at least the elimination of German participation. Legislation prohibiting trading with the enemy, the placing of certain trading activities under a system of licenses, amendments to company laws providing for a stricter control of stockholders, elimination of stock ownership in domestic companies by foreigners, and similar measures have made the continuation of most of the former private international commercial alliances impossible.

New Coordinations Include World Trade in Quinine.

On the other hand, a number of new alignments have been effected during the war, and some older ones have been changed. Among the latter is the International Quinine Agreement, which prior to the war was based upon a division of territory among American, British, Dutch, French and German companies. The original agreement specified that American and French manufacturers should keep out of Great Britain, while the British company should in turn not attempt to do business in France and the United States. Under the new agreement the British quinine interests have greatly extended their sphere of influence among the growers of cinchona bark in Java and in the sales markets in other parts of the world.

Java furnishes approximately ninety-five per cent. of the total world production of cinchona bark. The agreement made on July 15, 1918, between the growers in Java and European manufacturers controls the bulk of the cinchona production of Java and therefore virtually amounts to a world monopoly. The central office of the syndicate known as the "Kina" is located at Amsterdam. The profits in the quinine business may be gauged by the fact that in 1918-1919 the Bandoeng Quinine Works in Java, one of the participating concerns, distributed dividends amounting to 1,000 per cent.

Combination of Dyers Ignores National Boundaries.

Another strong combination with international ramifications which recently effected far-reaching changes in its organization is the Bradford Dyers' Association, Ltd., of England. The business of this association is that of dyeing on commission the products of those textile industries of which Bradford is the center. The chairman of the association stated in his annual address on February 27th of this year, that while the association had "sold its works in Kingersheim, Alsace, to a great organization which controls an overwhelmingly large percentage of the bleaching and dyeing works in France * * * we shall continue, as in the past, to give mutual aid to each other by the exchange of information of various kinds." The chairman reported also that the business at Bradford, Rhode Island, had been turned into an American company in which the British concern would in the future be interested as a stockholder only.

International Indigo Agreement.

A new international agreement¹ became known recently in connection with a suit for breach of contract filed in the United States District Court at Boston, on May 7, 1919, by E. Levinstein against E. I. DuPont de Nemours & Co. The agreement in question is alleged to have been made in 1916 between E. I. DuPont de Nemours & Co., of Wilmington, Delaware, and Levinstein, Ltd., of Manchester, England. It provides for an exchange of information regarding patented or secret processes and the apparatus, machinery and plant necessary for the manufacture of dyes, intermediates and raw materials. Under the terms of this agreement Levinstein shall have exclusive rights for the use, manufacture and sale under its own and the DuPont Company's patents and secret processes throughout Great Britain, Ireland, India and all British Possessions, Colonies and Dependencies (except Canada), France, Italy, Spain, Belgium, Holland,

¹See Exhibit No. 23, p. 542.

Portugal, Switzerland, Denmark, Norway and Sweden, and non-exclusive rights throughout Canada and all other countries except those for which the DuPont Company is to have exclusive rights. The DuPont Company's territory shall be the United States of America and all its possessions present and future, Mexico and Central and South America, and non-exclusive rights throughout all other countries except those restricted to Levinstein's. The agreement further provides for a subsequent meeting for arranging selling facilities in Japan and China, if possible in the form of a joint selling company. Other provisions of the agreement relate to payments by the DuPont concern to Levinstein's in connection with the manufacture of synthetic indigo and to royalties.

Indications Point to Renewal of Shipping Pool.

We alluded above to the North Atlantic Shipping Pool. Numerous other agreements as to rates, rebates, exclusive territories and various other elements of competition were in operation for longer or shorter periods among ocean shipping concerns of different countries prior to the war. Apparently the return to peace time conditions has given a new impetus to this combination movement. Not long ago the formation of an agreement adopted by the steamship lines operating in the United Kingdom trade was announced. This news was followed closely by reports indicating the formation of a South American shipping conference.¹

Movement Extends Into Wireless Telegraphy Field.

What appears to be a new field for international private agreements has been opened up by the progress made in wireless telegraphy. The important political aspect which might result from a monopolistic control by private parties of radio communication may ultimately lead to some form of supervision by the world

¹London Times, May 1, 1920.

powers. As it is, initial efforts appear to have been set on foot ° for centralizing control of this important instrument of international communication in the hands of an international group of private interests.

Allocating Products of Electric Lamp Industry Contemplated.

The possibility of a further addition to the list of new international combinations is mentioned in a recent report issued by the British Board of Trade, a summary of which is given in the London Times of March 20, 1920. That report states that there is in the British electric lamp industry a trade combination, the Electric Lamp Manufacturers' Association, which includes from ninety to ninety-five per cent. of the industry, controls factors and retailers, fixes prices at all stages and regulates output. The report goes on to say that the prices fixed by the Association become the standard prices for all lamps sold in Great Britain whether made by association or non-association manufacturers or imported from abroad. The Association is said to have been created primarily in the interests of three firms, the British Thomson-Houston Co., the General Electric Co., and Messrs. Siemens Brothers. It is also said that there is some danger of the interests of the British lamp industry being subordinated to American interests, since the largest of the three dominant firms in the Association is under control of an American electrical concern. The report says:

"There is a strong possibility of an international trade combination, embracing the leading manufacturers of America, Holland and Great Britain. The General Electric Company of America have a majority holding in the British Thomson-Houston Company, Ltd., in England, and have recently joined interests with Phillips Glow Lamp Works, Ltd., a very important lamp manufacturing concern in Holland. Recently, Phillips of Holland, acquired about one-eighth of the Edison-Swan Electric Co., Ltd., (in England) shares, and two Phillips directors have joined the Ediswan board. Such an international 'community of interests' might be able to dominate the world's lamp market, fix prices, regulate outputs and allocate markets. There is already an ar-

rangement between America and England whereby the respective markets are allocated, and British manufacturers are prevented from exporting to U. S. A., Mexico and Japan. Moreover, the British associated manufacturers control, through the General Electric Company of America, the best American glass bulbs, and have prevented non-associated manufacturers from obtaining supplies of that particular bulb."

Movement Toward International Trade Agreements Survives War.

As stated above, numerous if not most of the international organizations of producers have been terminated by the world war. But although the war disrupted the form it did not destroy the tendencies which received expression and importance through such international agreements. It merely diverted them into other channels. There are good reasons to believe that in the not too distant future international cartels will assume a much more important rôle in the trade relations among nations than in pre-war days.

First of all, during the war the combination movement made enormous progress in all the leading industrial countries of the world. In industries where all former efforts to bring about an effective organization had failed, powerful associations have been successfully formed and maintained to check competition and to co-operate in the common interest. In many cases pressure was brought to bear by government authorities to bring about solidarity and concerted action within an industry for the elimination of waste products, for obtaining greater efficiency through standardization, uniform accounting systems, etc., but chiefly in order to afford the government an opportunity to exercise its influence on prices from within a given industry.

National Unification of Individual Industries Aids Movement.

In the past, international organization was conditioned largely on national organization. International combines represented but a more advanced step in the evolution of cartels. Many international cartels grew out of national cartels. With old and

new combinations occupying a much stronger position within their home markets than ever before as a result of the war, it seems to us that more potential prerequisites exist at the present time for the formation of international agreements. The latter are the logical result of the former.

Partition of Trade Territory Precludes Tariff Wars.

Another factor tending in the same direction is the large debts incurred by the nations of the world during the war and subsequently. To meet these heavy obligations each country will be obliged, as a matter of national policy, to foster its domestic industries and to promote home production by all means within its power. It is but natural that a policy of that kind would involve the exclusion of competing goods of foreign origin. This does not necessarily have to be accomplished by tariff legislation and similar protective measures on the part of the government. A private agreement among organized producers of the various countries in a given industry, which would divide up the world's markets, might, *ceteris paribus*, accomplish the same results. It would in fact recommend itself because it would be less likely to lead to political friction such as might develop out of retaliatory tariffs, etc. The above-mentioned Levinstein-DuPont agreement is a recent example of a territorial division of this kind. (See pp. 365, 542.)

New Alignment of Trade Demand Recognition.

There is a third factor to be considered. In the course of the war large new competitive industries have grown up, particularly in the so-called key industries, in all the leading countries of the world. Where prior to the war Germany reigned supreme, in the manufacture of dyes, optical glass, incandescent lamp mantles, etc., the United States, Great Britain, France and Japan have succeeded in emancipating themselves. In other industries like the textile, copra oil, spices, furs, tobacco, etc., fundamental rearrangements have taken place. For example, in Hull and London the manufacture of margarine, fats and

oils from copra has been established on a permanent and self-supporting basis during the war. The manufacture of air nitrates in Germany, the great expansion of the textile and the leather glove industries in the United States, the new white lead industry in Australia and numerous other instances may be cited to illustrate our point. Under war pressure and with government backing many of these new industries leaped into life like Pallas from Zeus' head—fully equipped and armed. In this way competitive conditions have been entirely changed in domestic as well as in overseas market. Former purchasers and consumers have become producers and sellers. In many cases former customers have become competitors of their erstwhile suppliers. Besides, some of the large war industries are likely to look to foreign markets as an outlet for their surplus production, only to find that their competitors are doing the same thing.

In Numerous Instances Trade Understandings Deemed Advisable.

All these factors might lead us to anticipate an era of the keenest kind of competition in international trade, in which giants are matched against giants, and in which whole nations may become embroiled. However, it is not at all unlikely that common business sense will prevail, that, rather than engage in destructive economic warfare, producers will again meet and seek a *modus vivendi* for the regulation of competition, particularly in neutral markets. Points of contact for rapprochements and private commercial ententes will readily be found under circumstances where the only alternative would be a fight for life and death. Indeed, there are numerous indications that plans for reaching an understanding have already been under consideration here and abroad in industries which extend beyond national boundaries. Last year one of the leading organs of the British steel and iron industry in discussing after-the-war competition very frankly pointed out the advantages of an international cartel agreement between British and American producers of iron and steel. A rumor to the same effect was voiced in the

American press only the other day. In an editorial headed "International Export Agreements in Iron and Steel," the British Iron and Coal Trades Review of February 14, 1919, states that

"while the other European producing nations have years of reconstruction ahead which will absorb their capacity and probably leave them as importers rather than exporters,"

it should not be difficult for the British and the American producers

"to come to some understanding to enable both countries to live in the export markets of the world, and to ensure a distribution of products such as will leave a fair margin of profit for the producer. It is a preliminary to such an arrangement that the manufacturers of both countries should be satisfied with a fair and legitimate share of the trade that is available, and in view of the successful arrangements which were carried on for so many years through the Rail-makers' Association the hope may be expressed that an extension of these principles to other branches of the trade should be possible. The difficulties, of course, must not be underrated, but this much may be said—that political rivalries generally spring from trade rivalries, and if a political entente is possible, why not also a business entente? In these circumstances it is satisfactory to hear that pour-parlers have already been entered into, and an invitation has been sent by the British steel makers asking the Americans to send representatives over here in order to discuss matters. * * * The possibilities and benefits accruing from an international understanding at the moment are more obvious than they have ever been. * * * It is to be hoped that before long iron and steel makers of both countries will get round a table and endeavor to discuss matters."

According to the Drug and Chemical Markets of May 5, 1920, page 837:

"The Diamond Match Co. of the United States has proposed an amalgamation of all Japanese companies to control the match industry in Japan and China, and a working agreement with the Diamond Match Co. regarding supplies, as match wood is very scarce in Japan."

Drift Toward Community of Interests Influences Financiers.

Last, but not least, international financiers and investors will, unless all signs fail, form a very powerful element in favor of international combinations in the future. Financial penetration of foreign countries has assumed gigantic proportions. Investments in foreign commercial and industrial enterprises have become so numerous of late as not to attract particular attention any more. For example, in Canada in the neighborhood of six hundred branch factories have been established during the past two decades, principally by American and British manufacturing concerns. Exchange conditions in the money market, fallen values of foreign securities, temporary financial embarrassment, etc., have made numerous large enterprises in foreign countries the victims of commercial infiltration by nationals of other countries. We mention only the well-known Austrian Skoda Works now controlled by French interests, the domination of the iodine industry of Chile by the Iodine Syndicate of London, influence of Italian interests over the tobacco trade of Ecuador, new acquisitions of petroleum resources all over the world by the Dutch Shell and the Standard Oil interests, not to mention the penetration of China by foreign exploitation and development concerns. Why, it is argued, should not the modern captains of industry, in harmony with the trend of the times, seek to safeguard their incomes by some such means of co-operation as for instance a community of interests? Capitalistic self-interest will demand international organization of production and distribution as an instrument for strengthening its economic power or vice versa as a means of defense.

Labor Conditions Suggest Inauguration of International Cartels.

A new element, which may play a very important role in the future in connection with international cartel agreements is labor. A certain degree of uniformity in the methods of production and in labor conditions generally is an important pre-

requisite to the formation of certain types of international combinations. Without such uniformity, for instance in cost of production, it would be difficult, if not impossible, to reach some understanding as to a common price policy. Between plants using efficient and up-to-date methods and technically backward plants it will be a difficult matter to arrange a joint working agreement. In the past, the labor factor has been the rock upon which many a national cartel was wrecked, and which in other instances made impossible the bringing together of combinations of different countries. The establishment of a common interest among employers and owners and the necessity for them to act together in meeting demands of their combined employees has already constituted an important factor in the trust movement in Australia. What has happened there may repeat itself in the not too distant future on an international scale. The great progress made by organized labor in all parts of the world during the war, particularly the efforts of the International Labor Conference held at Washington, D. C., in 1919, and of the International Labor Office is, therefore, not unlikely to facilitate the formation of international cartels.

Legal Aspects Invite Attention.

With all indications to the effect that the problem of international combinations will assume a special degree of importance in the future, the legal aspects of the question also merit attention. As far as legislation is concerned, nearly all countries have statutory provisions of some kind or other which can be applied against combinations of a monopolistic nature. But they are not enforced with any degree of uniformity whatever. Under French and Austrian laws cartel agreements are non-enforceable. In a case relating to a cartel agreement between an Austrian and certain foreign concerns, the Austrian Supreme Court decided, on September 25, 1905, that the agreement was unlawful, even though price-fixing was not expressly mentioned in the cartel contract. Nevertheless, combinations exist and are being formed right along in Austria as elsewhere. In Italy and Belgium cartel agreements are valid *de jure*, but the use of

fraudulent means to effect a price policy is forbidden. Under German laws, which on the whole are friendly to cartels, agreements repugnant to good morals are unlawful. Under the English common law the courts are inclined to take a negative attitude toward monopolistic combinations.¹ The most drastic legislation against monopolistic combinations is found in the United States and in British colonies.

American Statutes Applicable to International Trust Situation.

Of the laws of the United States the following contain provisions which might be applied to international combinations, viz., the Sherman Anti-trust Act of 1890,² the Wilson Tariff Act of 1894³ as amended February 12, 1913, the Panama Canal Act of 1913,⁴ the Shipping Act of September 7, 1916, and the Export Trade Act (Webb-Pomercne Law) of 1918.⁵

A number of cases have come up in the federal courts of the United States under the Sherman Anti-trust Act in which it was made clear that restraint of trade within the United States resulting from combinations in foreign countries can be reached by that statute.

Tobacco Case Applies Statutes.

The first case, that of the *United States v. American Tobacco Company* (221 U. S. 106), had to deal with the international tobacco combination mentioned above (page 359) and culminated in a decree of dissolution. The United States Supreme Court held in that case that the court below was in error in dismissing the petition to declare contracts between the American company and the British company unlawful. Moreover, the Supreme Court stated

"that the decree of the lower court should have commended the observance of the anti-trust act by the foreign corporation so far as their dealings in the United States were concerned, and should have restrained these companies from

¹Att'y Gen'l, etc., of Australia v. Adelaide S. S. Co., (1913) App. Cases (Eng.) 781—citing Standard Oil Case.

²See Exhibit No. I, p. 405.

³See Exhibit No. II, p. 407.

⁴See Exhibit No. III, p. 408.

⁵See Exhibit No. VI, p. 438.

doing any act in the United States in violation of the anti-trust act, whether or not the right to do said acts was asserted to have arisen pursuant to the contracts made outside of or within the United States."

The lower court was, therefore, directed to determine

"a method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law."

It is to be noted, however, that in order to insure the continued development of export trade the court added the following significant observation:

"It may not be a wise public policy to make it easy for foreigners to take over the control of the British-American Company, with its large and growing business in foreign countries, notably in South Africa and the Far East, now in American hands. That is what would probably happen if the twenty-nine defendants be prohibited from increasing their holdings of that stock. We do not undertake to determine this question of public policy, which is one for the consideration of the executive branch of the government. It is sufficient to say that a further exception of the shares of company from the operation of this paragraph would not in our opinion make the plan repugnant to the law."

Shipping Pool Cases Reach Agreements Formed Abroad.

The case of *Thomsen v. Union Castle Mail S. S. Co.* (166 Fed. 251) involved a combination of ship owners to prevent competition between members by maintaining uniform freight rates in South African trade and to eliminate the possibility of competition with other lines by requiring shippers to pay forfeit money in case they patronized other lines. The court said:

"That the combination was formed in a foreign country is likewise immaterial. It affected the foreign commerce of this country and was put into operation here. The complaint, therefore, states an unlawful combination—a thing 'forbidden or declared to be unlawful' by the Act."

In *United States v. Pacific and Arctic Co.* (228 U. S. 87), involving a combination operating partly within and partly outside of the United States, the Supreme Court said:

"If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, we undoubtedly may control our own citizens and our own corporations."

Fruit Company Case Is Not Convincing Authority.

The decision by the United States Supreme Court in *American Banana Co. v. United Fruit Co.* (213 U. S. 347) in 1919, apparently assumed that the Sherman Act does not extend to acts done in foreign countries. The defendant, a New Jersey corporation, was accused of having instigated Costa Rican soldiers and officials to interfere with and deprive plaintiff of the use of the latter's railroad and banana plantation in Panama, with the connivance of the Governor of Panama. Defendant was also accused of having, by outbidding, driven purchasers out of the market and of having prevented plaintiff from buying for export and sale. The court held that

"the acts causing the damage were done, so far as appears, outside of the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the Act of Congress.

"The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.

"What the defendant did in Panama is not within the scope of the statute so far as the present suit is concerned.

"A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if permitted by the local law."

This decision does not seem logical or in accordance with the standard of judicial excellence we are accustomed to expect in the holdings by our national court of last resort.¹ It is certain the acts of defendant, if proven, did tend to obstruct the flow of

¹See p. 224.

the foreign commerce of the United States; and such conduct was held actionable in the last quoted case.

Injurious Results in United States Create Liability.

The foregoing decision was mentioned in *United States v. Nord Deutscher Lloyd* (223 U. S. 517), where the court held that while a statute has no extraterritorial force, and one cannot be indicted here for what he does in a foreign country, the making of a contract in a foreign country may, as in this case, create a condition operative in this country, under which acts of omission or commission can be punished here.

American Court Dissolves International Cartels.

In connection with the International Aluminum Cartel, mentioned above (page 361), it is to be noted that a petition to prevent further restraints upon interstate and foreign trade in aluminum and aluminum wares by the Aluminum Company of America was filed by the federal government on May 16, 1912, in the District Court for the Western District of Pennsylvania. A consent decree was entered at Pittsburgh on June 7, 1912. The cartel agreements were declared null and void and the Aluminum Company of America and all its agents and representatives were perpetually enjoined from directly or indirectly making any similar agreement relating to the sale of aluminum in or exportation from or importation into the United States.

In a somewhat similar case a decree was entered on June 2, 1914, in the United States District Court of New Jersey dissolving a combination between J. & P. Coats, Ltd. (the large British thread manufacturers), and affiliated corporations, and the American Thread Company and affiliated corporations, and enjoining them from engaging in certain unfair trade practices against independent manufacturers of thread.

A more recent case in point, which reached the United States Supreme Court, relates to the "Atlantic Conference," the international shipping combine, mentioned above (page 358). The case

first came up in the Circuit Court, S. D., New York, on December 20, 1911, (200 Fed. 806) the government seeking to prevent the further execution of the agreement which it was charged constituted the foundation of an illegal combination in violation of the Sherman Act. That court held that

“The agreement directly and materially affects foreign commerce and is partly intraterritorial because it is to be carried out in part in the United States.*** It requires acts to be done in this country; such acts are as material and essential as those to be performed abroad, and the part of the contract requiring them cannot be separated from the remainder. The prohibitions of the anti-trust statute apply broadly to contracts in restraint of trade or commerce with foreign nations. This contract directly and materially affects such commerce, and if it unlawfully restrains it, it comes within the statute. We see nothing to warrant the contention that the act should be narrowly interpreted as prohibiting only contracts which are to be performed wholly within the territorial jurisdiction of the United States nor—if it were for us to consider—any reason for concluding that a broader construction would lead to international complications. As the contract directly and materially affects the foreign commerce of this country by being put into effect here, it is immaterial where it was entered into or by what vessels it was to be, or has been, performed. Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad nor by employing foreign vessels to effect their purpose. Such combinations are to be tested by the same standard as similar combinations entered into here by citizens of this country. The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce?”

“Fighting Ships.”

On October 13, 1914, the same court (216 Fed. 971) issued an injunction against the maintenance of “fighting ships” on the part of some of the lines belonging to the Conference. These “fighting ships” were extra vessels, which, when a vessel not owned by a member of the combination, made lower rates than one which

was a member, were placed at a berth near such vessel, and met or went below such rates.

This case came up to the United States Supreme Court on appeal (*United States v. Hamburg Amerikanische Packetfahrt Actien Gesellschaft*, 239 U. S. 466). In its decision of January 10, 1916, the Supreme Court declined to pass upon the questions involved in the case, because they had, as an inevitable consequence of the European war, become moot.

When Anti-trust Law Was Held to Apply.

To sum up the court decisions under the Sherman Act which touch upon foreign commerce, it seems clear that the law applies to acts done by combinations within the United States in restraint of the foreign commerce of this country. The law has no extra-territorial force, and does not apply to acts done in a foreign country, except where such acts in whole or in part are to be carried out in the United States or create a condition operative in this country.

Wilson Act Enforced.

Under Section 73 of the Wilson Act (page 407), every combination, conspiracy, trust, agreement or contract between two or more persons or corporations engaged in importing any article from any foreign country into the United States is illegal when intended to operate in restraint of lawful trade or free competition or to increase the market price in any part of the United States of any article imported or intended to be imported or of any manufacture into which such imported article enters or is intended to enter.

On May 18, 1912, a petition was filed in the United States District Court, S. D., New York, by the Federal Government against Hermann Sielcken and others under these provisions of the Wilson Act. The action of the Government was taken to prevent an alleged undue restraint upon interstate and foreign commerce in coffee, growing out of the so-called coffee valoriza-

tion plan. This involved agreements between the Brazilian State of Sao Paulo and a syndicate of bankers and others, whereby the disposition of a large quantity of coffee was placed in the hands of a committee, and competition in the importation into and sale of such coffee in the United States was controlled by that committee. The plan resulted in doubling the retail price of coffee in the American markets. Upon the advice of the State Department that representations had been made by the Brazilian Government that the entire quantity of coffee which was being withheld from the market had been sold to a large number of dealers throughout the United States, the suit was dismissed in May, 1913.

Panama Act Contains Anti-trust Provision.

The Panama Canal Act of 1913, provides that no vessel may engage in the coastwise or foreign trade of the United States or pass through the Panama Canal if it is owned or controlled by any person or company doing business in violation of the Sherman Anti-trust Act or Sections 73 to 77 of the Wilson Tariff Act of 1894. Jurisdiction in respect to this last provision is conferred upon the Federal courts.

Shipping Act Provides Supervising Board.

The Shipping Act of September 7, 1916, contains several provisions which are applicable to agreements, understandings and conferences in ocean transportation. They probably will serve as a basis for action in case of complaints against international shipping combines in the future. Under Section 14 of that Act the giving of deferred rebates, the use of "fighting ships" and retaliatory or discriminatory contracts and methods on the part of common carriers by water is prohibited. Section 15 provides that common carriers by water or other persons subject to the Act shall file agreements fixing or regulating rates or fares; controlling competition; pooling or apportioning earnings, losses or traffic; allotting ports; limiting freight or passenger traffic; or providing in any manner for an exclusive, preferential or co-

operative working arrangement. The Shipping Board may disapprove, cancel or modify agreements that are unjustly discriminatory or unfair or which operate to the detriment of the commerce of the United States. Agreements approved by the Board shall be lawful and shall be exempt from the Sherman Anti-trust Act and Sections 73 to 77 of the Wilson Tariff Act. Section 17 deals with common carriers by water in foreign commerce, and prohibits them from charging discriminatory rates or rates that are prejudicial to exporters of the United States as compared with their foreign competitors. (See also page 13.)

Law Permits Combination in Export Trade.

The Export Trade Act (page 438) (Webb-Pomerene Law) of April 10, 1918, represents our most recent legislation relating to combinations. It allows the formation of associations or combinations of two or more individuals, partnerships or corporations to engage solely in export trade. Such export associations are exempt from the Sherman Law, provided they do not restrain trade, enhance or depress prices within the United States, or commit an act of unfair competition against an American competitor. It should be noted that the Act does not license combinations to injure foreign competitors. It requires them to file certain statements, including copies of their agreements, with the Federal Trade Commission and gives to that governmental agency certain powers of supervision.

Authority of Trade Commission is Extraterritorial.

A distinct feature of the Act consists in Section 4, which gives extraterritorial jurisdiction¹ to the Federal Trade Commission in cases of unfair competition against American competitors engaged in export trade, even when done outside the United States. This jurisdiction applies not only to combinations operating under the Webb-Pomerene Act, but also to individual American ex-

¹See Chapter XIV on "Extraterritorial Jurisdiction," p. 221.

porters. It remedies the defect in the Sherman Law which made itself felt in the case of *American Banana Co. v. United Fruit Co.*, which is discussed above (page 376).

American Anti-trust Principle Permeates Webb Statute.

The Webb-Pomerene Act represents the first concrete effort on the part of any country to establish a definite policy toward export trade combinations. While it makes possible numerous advantages of co-operation and co-ordination of efforts, it contains at the same time certain safeguards calculated to prevent monopolistic abuses. Various features of the Act, particularly the requirements as to registration, have been recognized by foreign parliamentary committees as warranting them to recommend similar legislation.

Anti-trust Laws Invalidate International Cartels.

Just what bearing the Act will have on international agreements remains to be seen. This much seems certain, that an international agreement or combination which tends to restrain trade unreasonably, involves unfair competition against other American exporters, or artificially and intentionally enhances or depresses prices within the United States would be unlawful under the Sherman Law as well as under the provisions of the Webb-Pomerene Law.

Generally speaking, therefore, international cartel agreements may be assumed to be invalid in those countries where cartel agreements are prohibited by civil or criminal law, in so far as the courts of these respective countries would be called upon to deal with cartel matters coming within their jurisdiction.

Methods Employed to Circumvent Anti-trust Law.

In order to get around this legal insecurity of international combinations, various expedients have been employed. They are partly of a juristic, partly of an administrative character. A

rather common method consists in locating the central or main office of an international combine in a country whose laws are liberal or where the courts follow a liberal policy towards combinations. Another expedient consists in having each member of the cartel deposit securities, as a bond for faithful compliance with the terms of the contract, in a country that is friendly to combinations. An arrangement is made that the securities thus deposited become automatically forfeited in case of failure on the part of a member to abide by his obligations under the cartel agreement.

Successful Evasion Compels Joint Governmental Action.

The fact that international combinations have grown in number and strength, notwithstanding the enactment of anti-trust laws in most countries, and the apparent success with which such combinations have circumvented efforts made by individual states to supervise, control or suppress them¹, have at various times given rise to plans for joint action by all states concerned. It was felt that a satisfactory solution of the problem was possible through co-operation among the different governments interested and through international law rather than through national laws.

Brussels Convention Remedies Sugar Situation.

The Brussels Sugar Convention represents the first successful attempt by a group of nations to wrestle with the problem of combinations. It was formed on March 5, 1902, and subsequently renewed several times, the last time in 1912, for a period of five years. The purpose of this convention was to arrest the practice of dumping sugar into foreign markets, which had been carried on by the sugar cartels of several European countries. These cartels were enabled to export sugar below the domestic market prices by reason of the fact that they were receiving sugar export bounties from their own governments. The treaty was

¹Report of Committee on Trusts, London, 1919, p. 33.

signed by Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, the Netherlands, Spain and Sweden, and was joined later by Luxemburg, Peru, Russia and Switzerland. Article 1 of the treaty provides that the parties to the agreement shall suppress direct or indirect bounties which would benefit the production or exportation of sugar and shall not establish such bounties during the term of the treaty. In article 4 it is provided that the signatories shall levy a special import tax on sugar imported from countries which allow bounties on the production or exportation of sugar, the amount of the tax to be equal to the value of the bounty.

War Disrupts European Administration of Sugar.

One of the economic effects of the world war was the disruption of the Brussels Convention. France withdrew on September 1, 1917, and other members followed later. The rearrangement of the world's map and the changed conditions arising therefrom as relating to the leading sugar producing countries will add a number of new problems to future efforts at international regulation of sugar exports. Russia's position is totally altered. The Ukraine alone produces more than eighty per cent. of the former Russian production, and most of the remaining part goes to Poland. A large part of France's sugar-beet area came within the war zone. England's interests, first as a buyer and consumer, and second on account of her sugar-cane producing colonies, have also been changed to a certain extent, while still other changes affecting Germany and Austria must be taken into account in case a new international sugar convention is to be formed. The sugar producers the world over have been well-organized in the past along national lines. War-time food-control measures resulted in still greater co-ordination. It is not at all improbable that in the future various national units in the sugar industry will establish some form of co-operation relative to the export trade which will again necessitate interference by the former members of the Brussels Convention.

The success achieved by the Brussels Sugar Convention directly suggested to several statesmen the expediency of applying the same principle to other phases of international commerce and trade as a means of protection against unfair trade practices. In 1902, four leading European statesmen, independent of one another, advocated further action along the lines of the Brussels Sugar Convention. They were Count Sergius Witte¹ of Russia¹, Count Goluchowski of Austria², Luigi Luzzati of Italy, and Herr Gothein³, a prominent member of the German Reichstag. Their avowed purpose was to protect European interests against American trusts and particularly against alleged dumping of American goods in European markets. However, no concrete results came from their proposals.

Official Regulation of Trade Methods is Present Tendency.

Some of the most objectionable practices of monopolistic combinations belong to the category of unfair competition. Laws for the suppression of that evil have been applied with considerable success in the prosecution of combinations. Indeed, an examination of recent debates in foreign parliaments on trusts shows a pronounced trend away from an exclusively repressive policy and in favor of government regulation, coupled with enforcement of unfair competition laws. A similar movement, *mutatis mutandis*, is now shaping itself in respect to international combinations.

International Industrial Union is Instituted.

In this connection the work of the International Union for the Protection of Industrial Property deserves notice. The membership of the Union embraced twenty-two countries, including the United States, at the time of its last meeting at Washington, D. C., in 1911. On that occasion the following provision was adopted for the suppression of unfair competition:

¹Commercial No. 1, London, 1903, p. 7.

²Neue Freie Presse, Vienna, Oct. 5, 1902.

³Session of the Reichstag of Oct. 30, 1902.

Article 10bis. All the contracting countries agree to assure to the members of the Union an effective protection against unfair competition.

On several occasions French and German courts have recognized their obligations under the foregoing agreement.

At the Sixth International Congress of Chambers of Commerce and Commercial and Industrial Associations at Paris, in 1914, the subject of international action against unfair competition had been placed on the program. Very little was done, however, outside of passing a resolution calling for further study of the problem by a special committee. At the recent Congress in Paris it was decided that the Chambers of the different countries should submit separate reports at the next convention.

As a result of the growth of the combination movement during the war, the problem of how to deal with international cartels is again beginning to attract public attention. In Great Britain the Committee on Commercial and Industrial Policy after the War in its final report,¹ recommends as follows:

"That it should be a legislative requirement that all international combinations or agreements (or combinations or agreements which are made directly on behalf of foreign interests) to which British companies or firms are parties, made for the regulation of the prices of goods or services, or for the delimitation of markets, should be registered at the Board of Trade by the British persons, firms or companies concerned, with a statement of the names of all the parties thereto and of the general nature and object of the combination or agreement; and that all modifications of such agreements and all adhesions and withdrawals should also be notified.

"That, in order that the Board of Trade may be able to keep itself fully informed as to the nature, extent and operations of industrial combinations in the United Kingdom or of international combinations of which British firms, companies or associations form part, that department should have power to call upon individual consolidations or combines from time to time to furnish for its confidential use such information as it may require."

¹London, 1918, p. 39 fol.

Extent of Problem Makes International Co-operation Necessary.

In the recent Report of Committee on Trusts of the British Ministry of Reconstruction¹ it is pointed out that legislation bearing on international agreements which is confined to one country might often be futile, unless it was accompanied by similar legislation elsewhere, and that international co-operation seems essential to prevent forms of monopoly. The report in this connection quotes Mr. Waldorf Astor, M. P., as follows:

"It is clear that the proper supervision of an international corporation, which is said to control half to three-quarters of the exportable world supplies of meat, and so is able to distribute enormous quantities of foodstuffs, becomes an international question. The trusts may have results inimical to the interests not only of consumers, but of agricultural producers of meat in the United Kingdom and other European consuming countries. The question of how these interests are to be safeguarded by the importing countries presents great difficulties. So far no satisfactory solution appears to have been found. What is clear, however, is that in dealing with an organization with so many ramifications and such vast financial strength, isolated individual action by particular countries is not likely to have any large measure of success. The solution will probably have to be found in general international action. Peoples may have to choose between the domination of private international trusts and some supervision by an official body representative of their respective Governments." (Page 33.)

In discussing imports controlled by combinations abroad the report states as follows:²

"No legislative measures taken here can curb the power of combinations operating in this way in foreign countries. Import duties might serve to relieve the combination of its gains, but discriminatory import duties are difficult to work and precarious in effect. Diplomatic representations can be made, but the method not likely in normal times to be either desirable or efficacious. The question of the control of international trade by private interests is eminently one for international action." (Page 28.)

¹ London, 1919, p. 33.

² l. c., p. 28.

American Plan Offers Correction Through Anti-trust Legislation.

More recently a tentative plan calling for the formation of an international trade commission which is to deal with complaints arising out of unfair trade practices, unfair competition and monopolistic activities of combinations of an international scope was outlined by Commissioner Huston Thompson of the Federal Trade Commission in an address before the Second Pan-American Financial Conference at Washington, D. C., on January 22, 1920. After having called attention to the national trade commissions now operating or in course of being established in various countries for the protection of trade and commerce against unfair competition, profiteering and monopolistic exploitation, Mr. Thompson pointed out the difficulty of dealing with those "who seek a world monopoly and who can injure, not only the consumers in their own country, but those in foreign countries." To meet a situation of that kind, he proposed joint action by the several national trade commissions through the medium of an international trade commission.

Regulation by International Commission.

We quote the following passage from Mr. Thompson's address :

"Some time ago I suggested a tentative plan for such a commission and invited the criticism of it. The idea came from seeing how the control of unfair practices and monopoly is yeasting in the minds of officials of many of our great nations. I then tried to picture an International Trade Commission assembled at some capital city to consider complaints between competitors of different nations. It was suggested that a rule could be made requiring the complaints to come through the National Trade Commission, or commerce departments of the several nations represented. In order that there might be no charge of discrimination, the case could be tried before representatives of the international body not belonging to either one of the nations whose citizens were litigating.

"The definition of what was an unfair trade practice before this commission could be found in the trade practices already condemned by the laws of many nations, both

ancient and modern, the rulings of the respective trade commissions, the 'trade practice submittal lists,'¹ such as our Commission has already received from some of our industries, the pronouncements of political economists, and above all, in the common sense of those before whom the case was presented after investigation and hearing. The international commission could publish its findings and either dismiss the complaint, if the charges were groundless, or render its verdict if the complaint was well-founded. The conclusion, together with the findings, could then be transmitted to the trade commission, or other proper representatives, of nations composing the international commission. In the universal publicity of the findings of such a body would lie the corrective. I have since been asked who would police the committing of the offenses. The answer is the same as in our domestic business—the competitor. Is there not every reason to believe that under the inspiration of the respective National Trade Commissions the industries in each nation would write their own 'trade practice submittal list' of unfair practices just as they are doing in this country? I have also been asked if some of the larger nations would not intervene in behalf of one of their citizens where complaint was made by a citizen of a smaller nation. This I think is inconceivable, for the publicity of the proceedings, if nothing else, would prevent it."

American Plan Meets With Widespread Support.

The plan outlined by Mr. Thompson has met with ready response both in this country and abroad. The Second Pan-American Financial Congress adopted a resolution to study the question and a bill recently introduced in Congress (H. J. Res. 300, 66th Congress, 2nd session) would have the President call an International Trade Agreement Congress for the purpose of considering means of eliminating and preventing unfair trade methods, practices and policies and to establish a system of settlement of controversies arising therefrom.

Universal Conscience Disapproves Aggrandizing World Trusts.

To sum up, an analysis of the factors which in the past have given rise to international combinations, cartels, etc., shows that

¹See p. 105.

similar conditions, quickened by potent new forces, obtain in national and international trade and commerce at the present time. Indications of increased co-operation in the not distant future among the organized business units of different countries appear on every side. The problem of international or rather supernational combinations promises to assume a position of importance in world trade equal to, if not greater, than the domestic "trust" question.

A universal reaction has set in against monopolistic combinations which have grown apace during the war. In one country after another parliamentary committees are wrestling with the "trust" problem. It is significant that in the reports and hearings made public thus far the international aspects of the combination movement are receiving almost as much attention as local and domestic sides of the question.

National Legislation Too Local to Master Difficulty.

It seems to be generally recognized that legislation by individual countries has not furnished a satisfactory solution. The chief obstacle has been the absence of co-ordinated action on the part of all governments concerned. Lack of uniform legislation and conflicting administrative policies have been very largely responsible for the unchecked growth of international combinations. In the one exception, that of the Brussels Sugar Convention, where the governments of the leading sugar producing and consuming countries of Europe agreed upon and enforced a joint policy, their common interest was effectively safeguarded.

When that Convention was formed, twenty years ago, Count Witte and others advocated an extension of its scope so as to bring the extraterritorial activities of all combinations within its jurisdiction. Substantially the same plan of an international trade commission is again being revived at the present time. Leading statesmen and influential and representative business men's organizations in the United States, England, Canada, South American countries, the Netherlands and in the Scandinavian countries have within the past year expressed themselves in favor

of establishing such an agency. The need of mutual protection against combinations whose ramifications reach beyond the jurisdiction of any one government and extend from country to country, is being recognized more fully as the potential dangers inherent in such cosmopolitan organizations become known through systematic official studies. Slowly but surely the movement for collective measures of defense, repression or supervision is crystalizing and of the many problems of reconstruction pressing for attention this one is apparently nearing the stage when definite action toward its solution will be effected.¹

CONSTRUCTIVE POLICY CALLED FOR IN WORLD TRADE.

Doubtless in numerous instances, international combinations are the natural outcome of world-wide conditions in some particular commodity or manufactured article; and in those instances the situation must be permitted to adjust itself in accordance with the economic law of supply and demand. Where the importance of the article or the amount of traffic so demands, the combination may be made the subject of an international agreement, though such trust methods as concealment of profits and secret coalitions make adjustment by and through diplomatic channels a tardy process—poor at its best. The number and size of these monopolies and their attitude toward the welfare of the people of the countries they supply, must be fully known before the ultimate consumer can estimate the toll which the combination extracts from his pockets. In some instances, the toll may be too small for serious consideration; but the *facts* should be afforded widespread publicity. To that end the list given in our text has been made exhaustive so far as the data now at hand permits.

While opinions may differ as to the wisdom of setting in motion the League of Nations as framed by President Wilson, it is certain the time has arrived for instituting *some* international trade council—some world-wide governmental agency where combinations, “trusts” and patent monopolies, transcending the

¹See new phases of unfair competition. (*In Yale Law Journal*, March, 1921.)

limits of any given country, however extensive its demesnes, can be placed under such measure of supervision and commercial control as the true interests of the people demand.

Commodities so essential as cotton and steel and vital medicines like quinine, should not be left to unregulated manipulation by exploiting promoters disguised as managers of international cartels and "trusts." Under modern conditions, users and consumers of those necessities of life are entitled to that measure of consideration; and public interest should be conserved by official supervision of the business conducted under every world-embracing agreement where an article of general utility is concerned.

Such a protective alliance offers the only effective means of defense; and it should be instituted and maintained in the common interest.

CHAPTER XXII.

Should Commercial Corporations Receive International Charters?

Kaleidoscopic Changes Involve Formative Readjustment.

In this momentous period of human change and progress, it behooves every thinking man to project his mind into the realms of world-commerce, and to discover in what respects we should readjust our national facilities, to the end that American resources may be utilized to the fullest extent in commerce, domestic and foreign. And as some contribution directed toward the accomplishment of that useful purpose, we shall devote the ensuing chapter to advocacy of a system of standardized international corporations with broad charter-powers conferred, exercised and practiced under special provisions of treaties or conventions between the nations concerned, under the firm belief that corporations thus organized will prove a beneficent force that can solve numerous difficulties and remove many occasions for just complaint, and may even prevent or overcome the frictions and misunderstandings that lead to war; and particularly is this true when the basic idea here presented is conjoined with and made effective by a plan for mutual action akin to a League of Nations.

However, lest we fall into the vice of drawing conclusions before we have established our premises, we ask permission at this stage to discuss briefly certain fundamental points.

Let us begin with certain axioms concerning the evolution of national existence, somewhat in the manner of the familiar parallel column.

In pursuance of our plan, we are led to enquire into the progressive stages through which nations have progressed:

First: All government consists in the surrender of some portion of individual liberty.

Second: Federation consists in a surrender of some portion of local or state government to a central authority.

Third: International agreements and regulations, also the League of Nations, if and when instituted, call for a further surrender to a paramount control.

Parallel Reasoning Applied to Corporate Development.

Advancement in the corporate idea is evolved by corresponding steps:

First: In the usual form of commercial companies, an individual investor surrenders the initiative and control of the enterprise to the corporate body, subject in a moderate degree to local governmental control.

Second: Since a comparatively recent date, but with a duration no one can predict, the Federal Government has grown to be a potent, if silent, factor in practically all corporate managements and activities. Recent war-time experience in that field has taught us we cannot think locally hereafter. Henceforth the people of America acting through the Federal Government are destined to be potential participants in most corporate enterprises.

Third: In an international corporation, this national prerogative of corporation control must in its turn become subject to a still higher power, instituted by international treaty or convention—a directing power measurably corresponding to the paramount influence and authority exercised by the League of Nations under the form of treaty propounded by the Peace Conference at Paris.

Course of Improvement Through Corporate Progress.

Having completed our comparison of the processes of development which human experience has produced in those cognate fields, let us now proceed to scrutinize the lines of procedure necessary to effectuate the establishment of this novel institution—the international corporation.

If (as we assume) it is apparent from this comparison that the principles of free government and of corporate management of business enterprises not only do not collide, but do actually support and assist one another, in proper hands, we shall feel encouraged to advance one step further and to outline the natural, and indeed, necessary channel along which this new current of business progress must flow, if it is to go forward at all.

First: The instituting of international commercial corporations calls for a general Federal incorporation act, available to every citizen or domestic corporation engaged in foreign trade. If (as some authorities in constitutional law maintain) Congress has power to create corporations empowered to operate only (a) within the Territories and the District of Columbia, or (b) in promotion of some intrastate object not connected with commerce—a precedent enlargement of the constitution will be required.

Second: Next in order must come a treaty or convention prescribing the form of the corporate charter, by-laws, etc., when it is proposed to apply for international rights; and when those preliminary requirements have been favorably disposed of, providing for the management of the enterprise, and the conservation of its property and interests in peace and in war; and specifically guaranteeing to each corporation thus privileged the right to treatment identical with that accorded to domestic corporations through (a) absence from liability to preliminary attachment, (b) the ability to employ local judicial machinery, and (c) fair treatment in all other quarters material to its successful operation.

It is presupposed each applicant shall possess a franchise from some member nation, and have its home office within that jurisdiction.

Third: Back of these corporate bodies and at their ready disposal should be the regulatory, and, if necessary, coercive power of a League (assuming one to have been instituted in substantial compliance with the formula contained in the Peace Treaty submitted to Congress), so that in case of actual or threatened discrimination or of manifest unfairness, adequate means for a prompt hearing by an international tribunal, and a way of com-

Foreign Enterprises Operate Under American Charters.

If more specific instances of corporations organized in the United States to operate in foreign parts are demanded, we can point to the Maritime Construction Company organized in New Jersey to build and maintain a transcontinental canal at Nicaragua and to the company which for years operated the railroad at Panama.

Maritime Traffic and Cable Facilities Regulated Internationally.

Still more closely in point and therefore more convincing are:

First: The convention of January 20, 1914, whereby each of fourteen countries (including the United States), agreed to use its utmost endeavors in the interests of safety of maritime passenger traffic. This pact goes far toward demonstrating how readily matters of current interest and material advancement are being taken up and disposed of by international conference and agreement, and the argument arises promptly and naturally—why not a convention covering the institution of international companies, with right to trade in foreign countries upon equal terms with local domestic concerns, provided reciprocal rights are accorded to citizens of those lands?

Second: But most nearly in point is the international convention of March 4, 1884, regulating the ownership and protection of maritime telegraph cables. It is obvious cables connecting two or more independent countries in every instance are subject to the laws of the several countries up to the three-mile boundary of jurisdiction, and elsewhere are under the general protection of international law, excepting in so far as treaty rights have been negotiated and placed in force.

In Practical Effect, International Corporations Now Existent.

In brief, corporations owning property of this description are naturally and necessarily *international commercial corporations*; and, upon compliance with certain requirements of general application, the proposed plan merely extends and offers to all commercial corporations the principle of protective supervision em-

bodied in the convention of 1884; thereby conferring upon them rights substantially similar to the privileges specially and specifically enjoyed by cable companies under that agreement. When stating and defining this new field for the exercise of corporate powers, we have deliberately and advisedly circumscribed their extent; and we have refrained from suggesting or making any claim that those rights should extend beyond privileges "substantially similar" to those conferred upon cable-owning concerns. Examination of the extent of those rights as contained in the several treaties will disclose how cable companies are privileged to invoke aid and summary protection from the commander of any war-vessel of the signatory powers; but, of course, such extraordinary grants of authority find no place in what, in its legal aspect, will be an *International General Incorporation Law*. If this convenient and seasoned power of organizing corporations under a general statute is translated into terms of international law, it accomplishes the result sought as the ultimate objective of the plan here proposed, viz., affords a feasible and convenient institution of sufficient scope to supplement, round out and complete the existing almost universal American system of franchise-acquirement. That the procurement of provisions permitting the formation of international corporations will call for negotiations and amendments to treaties is to be expected; unless (as we have seen was done in the matter of copyright privileges under the Act of 1905), we should extend generally to citizens of foreign nations the same privileges our citizens there enjoy.

Special International Agreement Required to Supply Desideratum.

However, there is a far more convenient and direct route leading to the accomplishment of the desired end. As we believe has been abundantly shown, persons in pursuit of the recognition and establishment of such a general extraterritorial institution are traveling along well-beaten pathways of international law. And the League of Nations (if and when set in motion as a component feature in the Peace Treaty as approved and ratified by Con-

gress), should and we believe will evolve a system of franchises for international corporations, granting equal privileges to every properly qualified citizen or subject of all countries embraced in that world-encircling compact.

The subject has many sides; and the advantages of the plan must appeal to financiers equally with manufacturers and traders.

Stabilizing Effect Aids and Protects Investors.

While the world in general is palpably in a state of flux—why not maintain capital also in a liquid state? Why not, by an authorized type of *International Commercial Corporations* provide a safe and convenient channel directed to those places where that capital is most required?

In these busy times the investor should not be worried or deterred by the obstacle of obscure foreign laws. The complications of business are sufficient of themselves; why add a needless fence, hurdle-like, over which investors must leap to obtain their goal—and this, too, in a quarter which presumably will provide only a fair business profit? Needless to say, the investor enriches the country which obtains the necessary capital for its development.

Obstacles Admit of Obviation.

Objections to corporations organized upon international lines have not been wanting; but in the main they yield readily to intelligent discussion.

Local Interests Should Receive Representation Upon Board.

In answer to the charge that as an alien body the international corporation will be out of touch with the wishes of the people of the country where it operates and will carry on its business by concealed methods—reasonable concessions will (or, at least, should) be made, to overcome this difficulty. One or more representatives upon the Board of Directors will assure to local interests in each country full information as to what is transpir-

ing; and this feature will, with equal certainty, maintain the right to urge arguments and press policies upon the consideration of the management. There is nothing inherently difficult—far less, dangerous or prohibitory—upon the score of representation. That question will readily find its answer; and a working basis should be evolved before an extended period of actual experience has elapsed.

Mutuality of Rights Simplifies Investment Situation.

Opportunities for overseas investment are bound to occur in countries where excessive freight charges, unsettled labor conditions and high tariffs, singly or in combination, obstruct the natural currents of trade. In countries thus situated, were factories established by American capital and run in accordance with American standards of efficiency as to equipment and management—they frequently would create or revive a profitable industry, even though the output did not exceed the demands of the domestic market. When such business opportunities occur, the American investor no longer will be a passive observer; and how simple his course when, instead of wrestling with the intricacies and the frequently adverse provisions of foreign laws, he is obliged merely to conform to certain prescribed requirements; and can say—"My international company possesses the right to demand impartial investigation and redress when grievances are alleged—with right to conservation of assets if war-time conditions arise. With these ample powers at command, I will encourage my company to venture forth and secure interests in foreign countries, where business was not available before."

Webb Law Associations Cover Special Field.

It well may be that the enquiry will arise: "Why does not the 'association' authorized under the Webb-Pomerene Export Trade Law meet the requirements of American foreign trade?" The question is pertinent; but in answer it can be shown that, while the Export Law as an initial statute fills an important gap

in our federal legislation, there are certain directions where its immediate influence is not felt. Thus, it is a disputed point whether our newly organized export trade organizations are empowered to conduct factories abroad, or to operate and maintain steamships and railways in connection with their foreign interests. When occasions for judicial construction arise, it is not likely the courts will grant the widest scope of power in every instance. The statute itself forbids our exporters to engage in import trade; and under the Wilson Tariff Act combinations in import business are made liable to prosecutions under the anti-trust laws. It thus will be seen that these "associations" must be classified as bodies organized under a Federal law applicable solely to American commerce directed to export channels (see pages 170, 280, 289)—and it follows necessarily that a commercial corporation possessing an international franchise would operate in a broader field.

Broad Charter Rights Required.

British acceptance corporations deal in the purchase and sale of credit accounts in foreign countries; and an American company with six million dollars of authorized capital has lately been launched to introduce our banking interests into this particular field, until now pre-empted by the financiers of Europe. Organized under the New York Laws, its charter affords it a wide range of action; but the franchise-powers of its British rivals have a greater latitude. Corporations of this description are international in their nature; and their usefulness should not be hampered by limitations valuable only in the jurisdiction of their creation.

Fairness of competition in banking as in other lines demands an equal measure of initial chartered powers. Just as our interstate commerce has overflowed and obliterated state lines in interstate commerce, the old barriers of national borders are in a way to be obliterated; and the volume of trade which intercourse between nations has created demands the *International Corporation* as a necessary factor in the regulation of the ebb and flood of that mighty tide.

APPENDIX.



EXHIBITS.

EXHIBIT I.

THE SHERMAN ANTI-TRUST ACT.¹

An Act to protect trade and commerce against unlawful restraints and monopolies.

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States; or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such

¹Act of July 2, 1890 (26 Stat. 209).

combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue

therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

EXHIBIT II.

THE WILSON TARIFF ACT¹ (1894), SECTIONS 73, 76 AND 77.

Sections 73, 76 and 77 of the Wilson Tariff Act, "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August 27, 1894, as amended February 12, 1913, reads as follows:

Sec. 73. That every combination, conspiracy, trust, agreement or contract is hereby declared to be contrary to public policy, illegal and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction

¹Act of August 27, 1894 (28 Stat. 570), amended February 12, 1913 (37 Stat. 667).

thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Sec. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy, and being the subject thereof mentioned in section seventy-three of this act, imported into and being within the United States or being in the course of transportation from one State to another, or to or from a Territory or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

Sec. 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

EXHIBIT III.

THE PANAMA CANAL ACT OF 1913,¹ SECTION II, PARAGRAPH 4.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both in-

¹Act of March 4, 1913 (37 Stat. 560).

clusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Anti-trust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney-General of the United States.

EXHIBIT IV.

THE FEDERAL TRADE COMMISSION ACT.¹

An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner

¹Act of September 26, 1914 (38 Stat. 717).

shall engage in any other business, vocation or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

Sec. 2. That each commissioner shall receive a salary of \$10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of \$5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

Sec. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corpora-

tions shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers and property of the said bureau shall become records, papers and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

Sec. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteen, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Anti-trust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership or corporation may make application, and upon good cause shown may be allowed by

the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such addi-

tional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in anywise relieve or absolve any person, partnership or corporation from any liability under the anti-trust acts.

Complaints, orders and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the per-

son to be served, or to a member of the partnership to be served, or to the president, secretary or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order or other process setting forth the manner of said service shall be proof of the same, and the return postoffice receipt for said complaint, order or other process registered and mailed as aforesaid shall be proof of the service of the same.

Sec. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce and its relation to other corporations and to individuals, associations and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management and relation to other corporations, partnerships and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the anti-trust acts, to

make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the anti-trust acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts in order that the corporation may thereafter maintain its organization, management and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations or practices of manufacturers, merchants or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Sec. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the anti-trust acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to re-

lief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

Sec. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses and receive evidence.

Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation

or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or other-

wise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 or more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall wilfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall wilfully make, or cause to be made, any false entry in any account, record or memorandum kept by any corporation subject to this Act, or who shall wilfully neglect or fail to make, or to cause to be made, full, true and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall wilfully remove out of the jurisdiction of the United States, or wilfully mutilate, alter or by any other means falsify any documentary evidence of such corporation, or who shall wilfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection, and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail, so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every

day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Sec. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the anti-trust Acts or the Acts to regulate commerce, nor shall any thing contained in the Act be construed to alter, modify or repeal the said anti-trust Acts or the Acts to regulate commerce or any part or parts thereof.

Approved, September 26, 1914.

EXHIBIT V.

THE CLAYTON ACT.¹

An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "anti-trust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and

¹Act of October 15, 1914 (38 Stat. 730).

monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of

differences in the grade, quality or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant

under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organization from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such ac-

quisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carriers from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or

make lawful anything heretofore prohibited or made illegal by the anti-trust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Sec. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus and undivided profits aggregating more than \$5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus and undivided profits as shown in the official statements of such bank, banking association or trust company filed as provided by law during the fiscal year next preceding the date set for the annual election of directors, and when a director, officer or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association or trust company may be a director or other officer or employee of not more than one other bank or trust company organized

under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of Class A of a Federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

Sec. 9. Every president, director, officer or manager of any

firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or wilfully misapplies, or wilfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or wilfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than \$500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

Sec. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of

the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigating or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding \$25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

Sec. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating

or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report

and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside or modify the order of the commission or board as in the case of an application by the commission or

board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the anti-trust Acts.

Complaints, orders and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order or other process setting forth the manner of said service shall be proof of the same, and the return postoffice receipt for said complaint, order or other process registered and mailed as aforesaid shall be proof of the service of the same.

Sec. 12. That any suit, action or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Sec. 13. That in any suit, action or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the anti-trust laws may run into any other district: *Provided*, That in civil cases

no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

Sec. 14. That whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers or agents of such corporation who shall have authorized, ordered or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer or agent he shall be punished by a fine of not exceeding \$5,000, or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

Sec. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 16. That any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court

of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission.

Sec. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and

when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Sec. 18. That, except as otherwise provided in section sixteen of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

Sec. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees and attorneys, or those in active concert or participation with them, and who shall, by personal service or otherwise, have received actual notice of the same.

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees,

or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Sec. 21. That any person who shall wilfully disobey any lawful writ, process, order, rule, decree or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

Sec. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine

shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

Sec. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or by any judge of any district court of the United States or any court of the District of Columbia.

Sec. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act,

may be punished in conformity to the usages at law and in equity now prevailing.

Sec. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

Sec. 26. If any clause, sentence, paragraph or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved, October 15, 1914.

EXHIBIT VI.

THE WEBB-POMERENE LAW.¹

An Act to promote export trade, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "export trade" wherever used in this Act mean solely trade or commerce in goods, wares or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares or merchandise, or any act in the course of such production, manufacture or selling for consumption or for resale.

That the words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States or in the District of

¹Act of April 10, 1918 (40 Stat. 516).

Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

That the word "association" wherever used in this Act means any corporation or combination, by contract or otherwise, of two or more persons, partnerships or corporations.

Sec. 2. That nothing contained in the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

Sec. 3. That nothing contained in section seven of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October fifteenth, nineteen hundred and fourteen, shall be construed to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States.

Sec. 4. That the prohibition against "unfair methods of competition" and the remedies provided for enforcing said prohibi-

tion contained in the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

Sec. 5. That every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management and relation to other associations, corporations, partnerships and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of

the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.

For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Approved, April 10, 1918.

EXHIBIT VII.

THE MCLEAN-PLATT ACT.¹

An Act amending section 25 of the Act approved December 23, 1913, known as the Federal Reserve Act, as amended by the Act approved September 7, 1916.

¹Act of September 17, 1919.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 25 of the Act approved December 23, 1913, known as the Federal Reserve Act, as amended by the Act approved September 7, 1916, be further amended by the addition of the following paragraph at the end of subparagraph 2 of the first paragraph, after the word "possessions."

Bank Investments

"Until January 1, 1921, any national banking association, without regard to the amount of its capital and surplus, may file application with the Federal Reserve Board for permission, upon such conditions and under such regulations as may be prescribed by said board, to invest an amount not exceeding in the aggregate 5 per centum of its paid-in capital and surplus in the stock of one or more corporations chartered or incorporated under the laws of the United States or of any State thereof and, regardless of its location, principally engaged in such phases of international or foreign financial operations as may be necessary to facilitate the export of goods, wares or merchandise from the United States or any of its dependencies or insular possessions to any foreign country; *Provided, however,* That in no event shall the total investments authorized by this section by any one national bank exceed 10 per centum of its capital and surplus."

Sec. 2. That paragraph 2 of said section be amended by adding after the word "banking," in line three, the words "or financial," so that the sentence will read: "Such application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking or financial operations proposed are to be carried on."

Foreign Branches

Sec. 3. That paragraph 3 of said section be amended by striking out the words "subparagraph 2 of the first paragraph of this section" and inserting in lieu thereof the word "above," so that the paragraph will read:

"Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every member bank investing in the capital stock of banks or corporations described above shall be required to furnish information concerning the condition of such banks or corporations to the Federal Reserve Board upon demand, and the Federal Reserve Board may order special examinations of the said branches, banks or corporations at such time or times as it may deem best."

EXHIBIT VIII.

THE EDGE ACT.¹

An Act to amend the Act approved December 23, 1913, known as the Federal Reserve Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act approved December 23, 1913, known as the Federal Reserve Act, as amended, be further amended by adding a new section as follows:

"Banking Corporations Authorized to do Foreign Banking Business

"Sec. 25 (a). Corporations to be organized for the purpose of engaging in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the agency, ownership or control of local institutions in foreign countries, or in such dependencies or insular possessions as provided by this section, and to act when required by the Secretary of the Treasury as fiscal agents of the United States, may be formed by any number of natural persons, not less in any case than five.

¹Act of December 24, 1919.

"Such persons shall enter into articles of association which shall specify in general terms the objects for which the association is formed and may contain any other provisions not inconsistent with law which the association may see fit to adopt for the regulation of its business and the conduct of its affairs.

"Such articles of association shall be signed by all of the persons intending to participate in the organization of the corporation and, thereafter, shall be forwarded to the Federal Reserve Board and shall be filed and preserved in its office. The persons signing the said articles of association shall, under their hands, make an organization certificate which shall specifically state:

"First: The name assumed by such corporation, which shall be subject to the approval of the Federal Reserve Board.

"Second: The place or places where its operations are to be carried on.

"Third: The place in the United States where its home office is to be located.

"Fourth: The amount of its capital stock and the number of shares into which the same shall be divided.

"Fifth: The names and places of business or residence of the persons executing the certificate and the number of shares to which each has subscribed.

"Sixth: The fact that the certificate is made to enable the persons subscribing the same, and all other persons, firms, companies and corporations, who or which may thereafter subscribe to or purchase shares of the capital stock of such corporation, to avail themselves of the advantages of this section.

"The persons signing the organization certificate shall duly acknowledge the execution thereof before a judge of some court of record or notary public, who shall certify thereto under the seal of such court or notary, and thereafter the certificate shall be forwarded to the Federal Reserve Board to be filed and preserved in its office. Upon duly making and filing articles of association and an organization certificate, and after the Federal Reserve Board has approved the same and issued a permit to begin business, the association shall become and be a body cor-

porate, and as such and in the name designated therein shall have power to adopt and use a corporate seal, which may be changed at the pleasure of its board of directors; to have succession for a period of twenty years unless sooner dissolved by the act of the shareholders owning two-thirds of the stock or by an Act of Congress or unless its franchises become forfeited by some violation of law; to make contracts; to sue and be sued, complain and defend in any court of law or equity; to elect or appoint directors, all of whom shall be citizens of the United States; and, by its board of directors, to appoint such officers and employees as may be deemed proper, define their authority and duties, require bonds of them, and fix the penalty thereof, dismiss such officers or employees, or any thereof, at pleasure and appoint others to fill their places; to prescribe, by its board of directors, by-laws not inconsistent with law or with the regulations of the Federal Reserve Board regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers and employees appointed; its property transferred, and the privileges granted to it by law exercised and enjoyed.

"Each corporation so organized shall have power, under such rules and regulations as the Federal Reserve Board may prescribe:

"(a) To purchase, sell, discount and negotiate, with or without its indorsement or guaranty, notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers and other evidences of indebtedness; to purchase and sell, with or without its indorsement or guaranty, securities, including the obligations of the United States or of any State thereof but not including shares of stock in any corporation except as herein provided; to accept bills or drafts drawn upon it subject to such limitations and restrictions as the Federal Reserve Board may impose; to issue letters of credit; to purchase and sell coin, bullion and exchange; to borrow and to lend money; to issue debentures, bonds and promissory notes under such general conditions as to security and such limitations as the Federal Reserve Board may prescribe, but in no event having liabilities outstanding thereon at any one time exceeding ten times its capi-

tal stock and surplus; to receive deposits outside of the United States and to receive only such deposits within the United States as may be incidental to or for the purpose of carrying out transactions in foreign countries or dependencies or insular possessions of the United States; and generally to exercise such powers as are incidental to the powers conferred by this Act or as may be usual, in the determination of the Federal Reserve Board, in connection with the transaction of the business of banking or other financial operations in the countries, colonies, dependencies or possessions in which it shall transact business and not inconsistent with the powers specifically granted herein. Nothing contained in this section shall be construed to prohibit the Federal Reserve Board, under its power to prescribe rules and regulations, from limiting the aggregate amount of liabilities of any or all classes incurred by the corporation and outstanding at any one time. Whenever a corporation organized under this section receives deposits in the United States authorized by this section it shall carry reserves in such amounts as the Federal Reserve Board may prescribe, but in no event less than 10 per centum of its deposits.

“(b) To establish and maintain for the transaction of its business branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be approved by the Federal Reserve Board and under such rules and regulations as it may prescribe, including countries or dependencies not specified in the original organization certificate.

“(c) With the consent of the Federal Reserve Board to purchase and hold stock or other certificates of ownership in any other corporation organized under the provisions of this section, or under the laws of any foreign country or a colony or dependency thereof, or under the laws of any State, dependency or insular possession of the United States but not engaged in the general business of buying or selling of goods, wares, merchandise or commodities in the United States, and not transacting any business in the United States except such as in the judgment of the Federal Reserve Board may be incidental to its

international or foreign business: *Provided, however,* That, except with the approval of the Federal Reserve Board, no corporation organized hereunder shall invest in any one corporation an amount in excess of 10 per centum of its own capital and surplus, except in a corporation engaged in the business of banking, when 15 per centum of its capital and surplus may be so invested: *Provided further,* That no corporation organized hereunder shall purchase, own or hold stock or certificates of ownership in any other corporation organized hereunder or under the laws of any State which is in substantial competition therewith, or which holds stock or certificates of ownership in corporations which are in substantial competition with the purchasing corporation.

"Nothing contained herein shall prevent corporations organized hereunder from purchasing and holding stock in any corporation where such purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith; and stock so purchased or acquired in corporations organized under this section shall within six months from such purchase be sold or disposed of at public or private sale unless the time to so dispose of same is extended by the Federal Reserve Board.

"No corporation organized under this section shall carry on any part of its business in the United States except such as, in the judgment of the Federal Reserve Board, shall be incidental to its international or foreign business: *And provided further,* That except such as is incidental and preliminary to its organization no such corporation shall exercise any of the powers conferred by this section until it has been duly authorized by the Federal Reserve Board to commence business as a corporation organized under the provisions of this section.

"No corporation organized under this section shall engage in commerce or trade in commodities except as specifically provided in this section, nor shall it either directly or indirectly control or fix or attempt to control or fix the price of any such commodities. The charter of any corporation violating this provision shall be subject to forfeiture in the manner hereinafter provided in this section. It shall be unlawful for any director, officer, agent or employee of any such corporation to use or to conspire to use

the credit, the funds or the power of the corporation to fix or control the price of any such commodities, and any such person violating this provision shall be liable to a fine of not less than \$1,000 and not exceeding \$5,000, or imprisonment not less than one year and not exceeding five years, or both, in the discretion of the court.

"No corporation shall be organized under the provisions of this section with a capital stock of less than \$2,000,000, one-quarter of which must be paid in before the corporation may be authorized to begin business, and the remainder of the capital stock of such corporation shall be paid in installments of at least 10 per centum on the whole amount to which the corporation shall be limited as frequently as one installment at the end of each succeeding two months from the time of the commencement of its business operations until the whole of the capital stock shall be paid in. The capital stock of any such corporation may be increased at any time, with the approval of the Federal Reserve Board, by a vote of two-thirds of its shareholders or by unanimous consent in writing of the shareholders without a meeting and without a formal vote, but any such increase of capital shall be fully paid in within ninety days after such approval; and may be reduced in like manner, provided that in no event shall it be less than \$2,000,000. No corporation, except as herein provided, shall during the time it shall continue its operations withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. Any national banking association may invest in the stock of any corporation organized under the provisions of this section, but the aggregate amount of stock held in all corporations engaged in business of the kind described in this section and in section 25 of the Federal Reserve Act as amended shall not exceed 10 per centum of the subscribing bank's capital and surplus.

"A majority of the shares of capital stock of any such corporation shall at all times be held and owned by citizens of the United States, by corporations the controlling interest in which is owned by citizens of the United States, chartered under the laws of the United States or of a State of the United States,

or by firms or companies, the controlling interest in which is owned by citizens of the United States. The provisions of section 8 of the Act approved October 15, 1914, entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' as amended by the Acts of May 15, 1916, and September 7, 1916, shall be construed to apply to the directors, other officers, agents or employees of corporations organized under the provisions of this section: *Provided, however,* That nothing herein contained shall (1) prohibit any director or other officer, agent or employee of any member bank, who has procured the approval of the Federal Reserve Board from serving at the same time as a director or other officer, agent or employee of any corporation organized under the provisions of this section in whose capital stock such member bank shall have invested; or (2) prohibit any director or other officer, agent or employee of any corporation organized under the provisions of this section, who has procured the approval of the Federal Reserve Board, from serving at the same time as a director or other officer, agent or employee of any other corporation in whose capital stock such first-mentioned corporation shall have invested under the provisions of this section.

"No member of the Federal Reserve Board shall be an officer or director of any corporation organized under the provisions of this section, or of any corporation engaged in similar business organized under the laws of any State, nor hold stock in any such corporation, and before entering upon his duties as a member of the Federal Reserve Board he shall certify under oath to the Secretary of the Treasury that he has complied with this requirement.

"Shareholders in any corporation organized under the provisions of this section shall be liable for the amount of their unpaid stock subscriptions. No such corporation shall become a member of any Federal reserve bank.

"Should any corporation organized hereunder violate or fail to comply with any of the provisions of this section, all of its rights, privileges and franchises derived herefrom may thereby be forfeited. Before any such corporation shall be declared dis-

solved, or its rights, privileges and franchises forfeited, any non-compliance with, or violation of such laws shall, however, be determined and adjudged by a court of the United States of competent jurisdiction, in a suit brought for that purpose in the district or territory in which the home office of such corporation is located, which suit shall be brought by the United States at the instance of the Federal Reserve Board or the Attorney General. Upon adjudication of such non-compliance or violation, each director and officer who participated in, or assented to, the illegal act or acts, shall be liable in his personal or individual capacity for all damages which the said corporation shall have sustained in consequence thereof. No dissolution shall take away or impair any remedy against the corporation, its stockholders or officers for any liability or penalty previously incurred.

"Any such corporation may go into voluntary liquidation and be closed by a vote of its shareholders owning two-thirds of its stock.

"Whenever the Federal Reserve Board shall become satisfied of the insolvency of any such corporation, it may appoint a receiver who shall take possession of all of the property and assets of the corporation and exercise the same rights, privileges, powers and authority with respect thereto as are now exercised by receivers of national banks appointed by the Comptroller of the Currency of the United States: *Provided, however,* That the assets of the corporation subject to the laws of other countries or jurisdictions shall be dealt with in accordance with the terms of such laws.

"Every corporation organized under the provisions of this section shall hold a meeting of its stockholders annually upon a date fixed in its by-laws, such meeting to be held at its home office in the United States. Every such corporation shall keep at its home office books containing the names of all stockholders thereof, and the names and addresses of the members of its board of directors, together with copies of all reports made by it to the Federal Reserve Board. Every such corporation shall make reports to the Federal Reserve Board at such times and in such form as it may require; and shall be subject to examina-

tion once a year and at such other times as may be deemed necessary by the Federal Reserve Board by examiners appointed by the Federal Reserve Board, the cost of such examinations, including the compensation of the examiners, to be fixed by the Federal Reserve Board and to be paid by the corporation examined.

"The directors of any corporation organized under the provisions of this section may, semi-annually, declare a dividend of so much of the net profits of the corporation as they shall judge expedient; but each corporation shall, before the declaration of a dividend, carry one-tenth of its net profits of the preceding half year to its surplus fund until the same shall amount to 20 per centum of its capital stock.

"Any corporation organized under the provisions of this section shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporation shall also be subject to tax as the personal property of the owners or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations.

"Any corporation organized under the provisions of this section may at any time within the two years next previous to the date of the expiration of its corporate existence, by a vote of the shareholders owning two-thirds of its stock, apply to the Federal Reserve Board for its approval to extend the period of its corporate existence for a term of not more than twenty years, and upon certified approval of the Federal Reserve Board such corporation shall have its corporate existence for such extended period unless sooner dissolved by the act of the shareholders owning two-thirds of its stock, or by an Act of Congress or unless its franchise becomes forfeited by some violation of law.

"Any bank or banking institution, principally engaged in foreign business, incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital suffi-

cient to entitle it to become a corporation under the provisions of this section may, by the vote of the shareholders owning not less than two-thirds of the capital stock of such bank or banking association, with the approval of the Federal Reserve Board, be converted into a Federal corporation of the kind authorized by this section with any name approved by the Federal Reserve Board: *Provided, however,* That said conversion shall not be in contravention of the State law. In such case the articles of association and organization certificate may be executed by a majority of the directors of the bank or banking institution, and the certificate shall declare that the owners of at least two-thirds of the capital stock have authorized the directors to make such certificate and to change or convert the bank or banking institution into a Federal corporation. A majority of the directors, after executing the articles of association and the organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a Federal corporation. The shares of any such corporation may continue to be for the same amount each as they were before the conversion, and the directors may continue to be directors of the corporation until others are elected or appointed in accordance with the provisions of this section. When the Federal Reserve Board has given such corporation a certificate that the provisions of this section have been complied with, such corporation and all its stockholders, officers and employees, shall have the same powers and privileges, and shall be subject to the same duties, liabilities and regulations, in all respects, as shall have been prescribed by this section for corporations originally organized hereunder.

“Every officer, director, clerk, employee or agent of any corporation organized under this section who embezzles, abstracts or wilfully misapplies any of the moneys, funds, credits, securities, evidences of indebtedness or assets of any character of such corporation; or who, without authority from the directors, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, debenture, draft, bill of exchange, mortgage, judgment or decree;

or who makes any false entry in any book, report or statement of such corporation with intent, in either case, to injure or defraud such corporation or any other company, body politic or corporate, or any individual person, or to deceive any officer of such corporation, the Federal Reserve Board, or any agent or examiner appointed to examine the affairs of any such corporation; and every receiver of any such corporation and every clerk or employee of such receiver who shall embezzle, abstract or wilfully misapply or wrongfully convert to his own use any moneys, funds, credits or assets of any character which may come into his possession or under his control in the execution of his trust or the performance of the duties of his employment; and every such receiver or clerk or employee of such receiver who shall, with intent to injure or defraud any person, body politic or corporate, or to deceive or mislead the Federal Reserve Board, or any agent or examiner appointed to examine the affairs of such receiver, shall make any false entry in any book, report, or record of any matter connected with the duties of such receiver; and every person who with like intent aids or abets any officer, director, clerk, employee or agent of any corporation organized under this section, or receiver or clerk or employee of such receiver as aforesaid in any violation of this section, shall upon conviction thereof be imprisoned for not less than two years nor more than ten years, and may also be fined not more than \$5,000, in the discretion of the court.

“Whoever being connected in any capacity with any corporation organized under this section represents in any way that the United States is liable for the payment of any bond or other obligation, or the interest thereon, issued or incurred by any corporation organized hereunder, or that the United States incurs any liability in respect of any act or omission of the corporation, shall be punished by a fine of not more than \$10,000 and by imprisonment for not more than five years.”

Approved, December 24, 1919.

EXHIBIT IX.

REGULATIONS OF THE FEDERAL RESERVE BOARD FOR BANKS
OPERATING UNDER THE EDGE ACT.¹*Banking Corporations Authorized to do Foreign Banking Business
Under the Terms of Section 25(a) of the
Federal Reserve Act.*

The Federal Reserve Board issues herewith its rules and regulations governing the organization and operation of corporations under the provisions of section 25(a) of the Federal Reserve Act.

Section 25 of the Federal Reserve Act, as amended by the Act of September 7, 1916, authorized national banks having a capital and surplus of \$1,000,000 or more to invest, under certain circumstances, in the stock of banks or corporations chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking. At that time, however, Congress had not provided any means for the Federal incorporation of foreign banking corporations in whose stock it expressly authorized national banks to invest. In the enactment of section 25(a) of the Federal Reserve Act, approved December 24, 1919, Congress has now provided a means for the incorporation of institutions for the purpose of engaging in international or foreign banking or other international or foreign financial operations in whose stock national banks, as well as individuals, firms and other corporations, may invest.

While the public discussions of the purpose of this law have emphasized the fact that it is to permit American investors by means of Federal corporations to assist in the reconstruction of Europe at a time when such assistance is most vitally needed, nevertheless the real purpose is a broader one, that is, to provide for the establishment of a Federal system of international banking or financial corporations operating under Federal supervision with powers sufficiently broad to enable them effectively

¹Issued March 23, 1920.

to compete with similar foreign institutions and to afford to the American exporter and importer at all times a possible means of financing his foreign business. Although it is true that the immediate effect of the operation of corporations under the terms of this section may be greatly to aid in the extension of much needed long-term credits to Europe, that effect is in reality only one incident to the permanent development of the American export market.

Congress being mindful of the unusual powers conferred by this section, has placed upon the Federal Reserve Board the responsibility of making such regulations and restrictions as may be necessary to insure the conservative and prudent management of corporations chartered under its provisions and to safeguard as far as possible the interests of the public with whom they may do business. The Federal Reserve Board, therefore, while realizing the importance of making its regulations sufficiently liberal to enable corporations operating under them effectively to compete with foreign institutions or State institutions doing a foreign business, has been impelled by the ordinary principles of banking prudence to impose restrictions which it believes will ultimately do much to command the prestige and public confidence upon which must depend the success of every corporation of this character.

It is realized by the Federal Reserve Board that the organization and operation of these corporations involve new principles and new fields of effort, and that experience may demonstrate that the regulations promulgated herewith are in some respects too restrictive and in other respects too liberal. The Federal Reserve Board, therefore, in order to permit of the development of operations under the terms of this section in the manner contemplated by Congress, reserves the right from time to time to amend its regulations in such manner as experience and changing conditions may dictate.

W. P. G. HARDING,
Governor.

W. T. CHAPMAN,
Secretary.

*Banking Corporations Authorized to do Foreign Banking Business
Under the Terms of Section 25(a) of the
Federal Reserve Act.*

I. ORGANIZATION.

Any number of natural persons, not less in any case than five, may form a corporation^a under the provisions of section 25(a) for the purpose of engaging in international or foreign banking or other international or foreign financial operations or in banking or other financial operations in a dependency or insular possession of the United States either directly or through the agency, ownership or control of local institutions in foreign countries or in such dependencies or insular possessions.

II. ARTICLES OF ASSOCIATION.

Any persons desiring to organize a corporation for any of the purposes defined in section 25(a) shall enter into articles of association (see Federal Reserve Board Form 151, which is suggested as a satisfactory form of articles of association) which shall specify in general terms the objects for which the corporation is formed, and may contain any other provisions not inconsistent with law which the corporation may see fit to adopt for the regulation of its business and the conduct of its affairs. The articles of association shall be signed by each person intending to participate in the organization of the corporation and when signed shall be forwarded to the Federal Reserve Board in whose office they shall be filed.

III. ORGANIZATION CERTIFICATE.

All of the persons signing the articles of association shall under their hands make an organization certificate (Federal Reserve Board Form 152) which shall state specifically:

^aWhenever these regulations refer to a Corporation spelled with a capital C, they relate to a corporation organized under section 25 (a) of the Federal Reserve Act.

First: The name assumed by the corporation.

Second: The place or places where its operations are to be carried on.

Third: The place in the United States where its home office is to be located.

Fourth: The amount of its capital stock and the number of shares into which it shall be divided.

Fifth: The names and places of business or residences of persons executing the organization certificate and the number of shares to which each has subscribed.

Sixth: The fact that the certificate is made to enable the persons subscribing the same and all other persons, firms, companies and corporations who or which may thereafter subscribe to or purchase shares of the capital stock of such corporation to avail themselves of the advantages of this section.

The persons signing the organization certificate shall acknowledge the execution thereof before a judge of some court of record or notary public who shall certify thereto under the seal of such court or notary. Thereafter the certificate shall be forwarded to the Federal Reserve Board to be filed in its office.

IV. TITLE.

Inasmuch as the name of the corporation is subject to the approval of the Federal Reserve Board, a preliminary application for that approval should be filed with the Federal Reserve Board on Federal Reserve Board Form 150. This application should state merely that the organization of a corporation under the proposed name is contemplated and may request the approval of that name and its reservation for a period of thirty days. No corporation which issues its own bonds, debentures or other such obligations will be permitted to have the word "bank" as a part of its title. No corporation which has the word "Federal" in its title will be permitted also to have the word "bank" as a part of its title. So far as possible the title of the corporation should indicate the nature or reason of the business contemplated and should in no case resemble the

name of any other corporation to the extent that it might result in misleading or deceiving the public as to its identity, purpose, connections or affiliations.

V. AUTHORITY TO COMMENCE BUSINESS.

After the articles of association and organization certificate have been made and filed with the Federal Reserve Board, and after they have been approved by the Federal Reserve Board and a preliminary permit to begin business has been issued by the Federal Reserve Board, the association shall become and be a body corporate, but none of its powers except such as are incidental and preliminary to its organization shall be exercised until it has been formally authorized by the Federal Reserve Board by a final permit generally to commence business.

Before the Federal Reserve Board will issue its final permit to commence business, the president or cashier, together with at least three of the directors, must certify (a) that each director elected is a citizen of the United States; (b) that a majority of the shares of stock is owned by citizens of the United States, by corporations the controlling interest in which is owned by citizens of the United States, chartered under the laws of the United States, or by firms or companies the controlling interest in which is owned by citizens of the United States; and (c) that of the authorized capital stock specified in the articles of association at least 25 per cent. has been paid in in cash and that each shareholder has individually paid in in cash at least 25 per cent. of his stock subscription. Thereafter the cashier shall certify to the payment of the remaining installments as and when each is paid in, in accordance with law.

VI. CAPITAL STOCK.

No corporation may be organized under the terms of section 25(a) with a capital stock of less than \$2,000,000. The par value of each share of stock shall be specified in the articles of association and no corporation will be permitted to issue stock

of no par value. If there is more than one class of stock the name and amount of each class and the obligations, rights and privileges attaching thereto shall be set forth fully in the articles of association. Each class of stock shall be so named as to indicate to the investor as nearly as possible what is its character and to put him on notice of any unusual attributes.

VII. TRANSFERS OF STOCK.

Section 25(a) provides in part that—

A majority of the shares of the capital stock of any such corporation shall at all times be held and owned by the citizens of the United States, by corporations the controlling interest in which is owned by citizens of the United States, chartered under the laws of the United States or of a State of the United States, or by firms or companies, the controlling interest in which is owned by citizens of the United States.

In order to insure compliance at all times with the requirements of this provision after the organization of the corporation, shares of stock shall be issuable and transferable only on the books of the corporation. Every application for the issue or transfer of stock shall be accompanied by an affidavit of the party to whom it is desired to issue or transfer stock, or by his or its duly authorized agent, stating—

In the case of an individual—(a) Whether he is or is not a citizen of the United States and if a citizen of the United States, whether he is a natural born citizen or a citizen by naturalization, and if naturalized, whether he remains for any purpose in the allegiance of any foreign sovereign or state; (b) Whether there is or is not any arrangement under which he is to hold the shares or any of the shares which he desires to have issued or transferred to him, in trust for or in any way under the control of any foreign state or any foreigner, foreign corporation or any corporation under foreign control, and if so, the nature thereof.

In the case of a corporation.—(a) Whether such corporation is or is not chartered under the laws of the United States or of

a State of the United States. If it is not, no further declaration is necessary, but if it is, it must also be stated (b) whether the controlling interest in such corporation is or is not owned by citizens of the United States, and (c) whether there is or is not any arrangement under which such corporation will hold the shares or any of the shares if issued or transferred to such corporation, in trust for or in any way under the control of any foreign state or any foreigner or foreign corporation or any corporation under foreign control, and if so, the nature thereof.

In the case of a firm or company.—(a) Whether the controlling interest in such firm or company is or is not owned by citizens of the United States and, if so, (b) whether there is or is not any arrangement under which such firm or company will hold the shares or any of the shares if issued or transferred to such firm or company in trust for or in any way under the control of any foreign state or any foreigner or foreign corporation or any corporation under foreign control and if so, the nature thereof.

The board of directors of the corporation, whether acting directly or through an agent, may, before making any issue or transfer of stock, require such further evidence as in their discretion they may think necessary in order to determine whether or not the issue or transfer of the stock would result in a violation of the law. No issue or transfer of stock which would cause 50 per cent. or more of the total amount of stock issued or outstanding to be held contrary to the provisions of the law or these regulations shall be made upon the books of the corporation. The decision of the board of directors in each case shall be final and conclusive and not subject to any question by any person, firm or corporation on any ground whatsoever.

If at any time by reason of the fact that the holder of any shares of the corporation ceases to be a citizen of the United States, or, in the opinion of the board of directors, becomes subject to the control of any foreign state or foreigner or foreign corporation or corporation under foreign control, 50 per cent. or more of the total amount of capital stock issued or outstanding is held contrary to the provisions of the law or these regulations, the board of directors may, when apprised of that fact,

forthwith serve on the holder of the shares in question a notice in writing requiring such holder within two months to transfer such shares to a citizen of the United States, or to a firm, company or corporation approved by the board of directors as an eligible stockholder. When such notice has been given by the board of directors the shares of stock so held shall cease to confer any vote until they have been transferred as required above and if on the expiration of two months after such notice the shares shall not have been so transferred, the shares shall be forfeited to the corporation.

The board of directors shall prescribe in the by-laws of the corporation appropriate regulations for the registration of the shares of stock in accordance with the terms of the law and these regulations. The by-laws must also provide that the certificates of stock issued by the corporation shall contain provisions sufficient to put the holder on notice of the terms of the law and the regulations of the Federal Reserve Board defining the limitations upon the rights of transfer.

VIII. OPERATIONS IN THE UNITED STATES.

No corporation shall carry on any part of its business in the United States except such as shall be incidental to its international or foreign business. Agencies may be established in the United States with the approval of the Federal Reserve Board for specific purposes, but not generally to carry on the business of the corporation.

IX. INVESTMENTS IN THE STOCK OF OTHER CORPORATIONS.

It is contemplated by the law that a corporation shall conduct its business abroad either directly or indirectly through the ownership or control of corporations, and it is accordingly provided that a corporation may invest in the stock, or other certificates of ownership, of any other corporation organized--

(a) Under the provisions of section 25(a) of the Federal Reserve Act;

(b) Under the laws of any foreign country or a colony or dependency thereof;

(c) Under the laws of any State, dependency or insular possession of the United States; provided, first, that such other corporation is not engaged in the general business of buying or selling goods, wares, merchandise or commodities in the United States; and second, that it is not transacting any business in the United States except such as is incidental to its international or foreign business.

Except with the approval of the Federal Reserve Board, no corporation shall invest an amount in excess of 15 per cent. of its capital and surplus in the stock of any corporation engaged in the business of banking, or an amount in excess of 10 per cent. of its capital and surplus in the stock of any other kind of corporation.

No corporation shall purchase any stock in any other corporation organized under the terms of section 25(a) or under the laws of any State, which is in substantial competition therewith, or which holds stock or certificates of ownership in corporations which are in substantial competition with the purchasing corporation. This restriction, however, does not apply to corporations organized under foreign laws.

X. BRANCHES.

No corporation shall establish any branches except with the approval of the Federal Reserve Board, and in no case shall any branch be established in the United States.

XI. ISSUE OF DEBENTURES, BONDS AND PROMISSORY NOTES.

Approval of the Federal Reserve Board.—No corporation shall make any public or private issue of its debentures, bonds, notes or other such obligations without the approval of the Federal Reserve Board, but this restriction shall not apply to notes issued by the corporation in borrowing from banks or bankers for temporary purposes not to exceed one year. The approval of the Federal Reserve Board will be based solely upon the right of the corporation to make the issue under the terms of this regulation and shall not be understood in any way to imply that the

Federal Reserve Board has approved or passed upon the merits of such obligations as an investment. The Federal Reserve Board will consider the general character and scope of the business of the corporation in determining the amount of debentures, bonds, notes or other such obligations of the corporation which may be issued by it.

Application.—Every application for the approval of any such issue by a corporation shall be accompanied by (1) a statement of the condition of the corporation in such form and as of such date as the Federal Reserve Board may require; (2) a detailed list of the securities by which it is proposed to secure such issue, stating their maturities, indorsements, guaranties or collateral, if any, and in general terms the nature of the transaction or transactions upon which they were based; and (3) such other data as the Federal Reserve Board may from time to time require.

Advertisements.—No circular, letter or other document advertising the issue of the obligations of a corporation shall state or contain any reference to the fact that the Federal Reserve Board has granted its approval of the issue to which the advertisement relates. This requirement will be enforced strictly in order that there may be no possibility of the public's misconstruing such a reference to be an approval by the Federal Reserve Board of the merits or desirability of the obligations as an investment.

XII. SALE OF FOREIGN SECURITIES.

Approval of the Federal Reserve Board.—No corporation shall offer for sale any foreign securities with its indorsement or guaranty, except with the approval of the Federal Reserve Board, but such approval will be based solely upon the right of the corporation to make such a sale under the terms of this regulation and shall not be understood in any way to imply that the Federal Reserve Board has approved or passed upon the merits of such securities as an investment.

Application.—Every application for the approval of such sale shall be accompanied by a statement of the character and amount of the securities proposed to be sold, their indorsements, guaran-

ties or collateral, if any, and such other data as the Federal Reserve Board may from time to time require.

Advertisements.—No circular, letter or other document advertising the sale of foreign securities by a corporation with its indorsement or guaranty shall state or contain any reference to the fact that the Federal Reserve Board has granted its approval of the sale of the securities to which the advertisement relates.

XIII. ACCEPTANCES.

Kinds.—Any corporation may accept drafts and bills of exchange drawn upon it which grow out of transactions involving the importation or exportation of goods, provided, however, that except with the approval of the Federal Reserve Board, and subject to such limitations as it may prescribe, no corporation shall exercise its power to accept drafts or bills of exchange if at the time such drafts or bills are presented for acceptance it has outstanding any debentures, bonds, notes or other such obligations issued by it.

Maturity.—No corporation shall accept any draft or bill of exchange with a maturity in excess of six months except with the approval of the Federal Reserve Board.

Limitations.—(1) Individual drawers: No acceptances shall be made for the account of any one drawer in an amount aggregating at any time in excess of 10 per cent. of the subscribed capital and surplus of the corporation, unless the transaction be fully secured or represents an exportation or importation of commodities and is guaranteed by a bank or banker of undoubted solvency. (2) Aggregates: Whenever the aggregate of acceptances outstanding at any time (a) exceeds the amount of the subscribed capital and surplus, 50 per cent. of all the acceptances in excess of the amount shall be fully secured; or (b) exceeds twice the amount of the subscribed capital and surplus, all the acceptances outstanding in excess of such amount shall be fully secured. (The corporation shall elect whichever requirement (a) or (b) calls for the smaller amount of secured acceptances.)

Reserves.—Against all acceptances outstanding which mature

in thirty days or less a reserve of at least 15 per cent. shall be maintained, and against all acceptances outstanding which mature in more than thirty days a reserve of at least 3 per cent. shall be maintained. Reserves against acceptances must be in liquid assets of any or all of the following kinds: (1) cash; (2) balances with other banks; (3) bankers' acceptances; and (4) such securities as the Federal Reserve Board may from time to time permit.

XIV. DEPOSITS.

In the United States.—No corporation shall receive in the United States any deposits except such as are incidental to or for the purpose of carrying out transactions in foreign countries or dependencies of the United States where the corporation has established agencies, branches or where it operates through the ownership or control of subsidiary corporations. Deposits of this character may be made by individuals, firms, banks or other corporations, whether foreign or domestic, and may be time deposits or on demand.

Outside the United States.—Outside the United States a corporation may receive deposits of any kind from individuals, firms, banks or other corporations, provided, however, that if such corporation has any of its bonds, debentures or other such obligations outstanding it may receive abroad only such deposits as are incidental to the conduct of its exchange, discount or loan operations.

Reserves.—Against all deposits received in the United States a reserve of not less than 13 per cent. must be maintained. This reserve may consist of cash in vault, a balance with the Federal Reserve Bank of the district in which the head office of the corporation is located, or a balance with any member bank. Against all deposits received abroad the corporation shall maintain such reserves as may be required by local laws and by the dictates of sound business judgment and banking principles.

XV. GENERAL LIMITATIONS AND RESTRICTIONS.

Liabilities of one borrower.—The total liabilities to a corporation of any person, company, firm or corporation for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed 10 per cent. of the amount of its subscribed capital and surplus, except with the approval of the Federal Reserve Board: *Provided, however,* That the discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed within the meaning of this paragraph. The liability of a customer on account of an acceptance made by the corporation for his account is not a liability for money borrowed within the meaning of this paragraph unless and until he fails to place the corporation in funds to cover the payment of the acceptance at maturity or unless the corporation itself holds the acceptance.

Aggregate liabilities of the corporation.—The aggregate of the corporation's liabilities outstanding on account of acceptances, average deposits, domestic and foreign, debentures, bonds, notes, guaranties, indorsements and other such obligations shall not exceed at any one time ten times the amount of the corporation's subscribed capital and surplus except with the approval of the Federal Reserve Board. In determining the amount of the liabilities within the meaning of this paragraph, indorsements of bills of exchange having not more than six months to run, drawn and accepted by others than the corporation, shall not be included.

Operations abroad.—Except as otherwise provided in the law and these regulations, a corporation may exercise abroad not only the powers specifically set forth in the law but also such incidental powers as may be usual in the determination of the Federal Reserve Board in connection with the transaction of the business of banking or other financial operations in the countries in which it shall transact business. In the exercise of any of these powers abroad a corporation must be guided by the laws

of the country in which it is operating and by sound business judgment and banking principles.

XVI. MANAGEMENT.

The directors, officers or employees of a corporation shall exercise their rights and perform their duties as directors, officers or employees, with due regard to both the letter and the spirit of the law and these regulations. For the purpose of these regulations the corporation shall, of course, be responsible for all acts of omission or commission of any of its directors, officers, employees or representatives in the conduct of their official duties. The character of the management of a corporation and its general attitude toward the purpose and spirit of the law and these regulations will be considered by the Federal Reserve Board in acting upon any application made under the terms of these regulations.

XVII. REPORTS AND EXAMINATIONS.

Reports.—Each corporation shall make at least two reports annually to the Federal Reserve Board at such times and in such form as it may require.

Examinations.—Each corporation shall be examined at least once a year by examiners appointed by the Federal Reserve Board. The cost of examinations shall be paid by the corporation examined.

XVIII. AMENDMENTS TO REGULATIONS.

These regulations are subject to amendment by the Federal Reserve Board from time to time, provided, however, that no such amendment shall prejudice obligations undertaken in good faith under regulations in effect at the time they were assumed.

EXHIBIT X.

AMENDMENT TO THE CLAYTON ACT.¹

An Act to amend section 8 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended May 15, 1916.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended by the Act of May 15, 1916, be further amended by inserting in the proviso at the end of the second clause of said section after the word "prohibit" the words "any private banker or," so that the proviso as amended shall read:

"And provided further, That nothing in this Act shall prohibit any private banker or any officer, director or employee of any member bank or class A director of a Federal reserve bank, who shall first procure the consent of the Federal Reserve Board, which board is hereby authorized, at its discretion, to grant, withhold or revoke such consent, from being an officer, director or employee of not more than two other banks, banking associations or trust companies, whether organized under the laws of the United States or any State, if such other bank, banking association or trust company is not in substantial competition with such banker or member bank.

"The consent of the Federal Reserve Board may be procured before the person applying therefor has been elected as a class A director of a Federal reserve bank or as a director of any member bank."

Approved May 26, 1920.

¹Act of May 26, 1920.

EXHIBIT XI.

FORM FOR FIRST REPORT FROM EXPORT ASSOCIATION.

FEDERAL TRADE COMMISSION

WASHINGTON, D. C.

FIRST REPORT FROM EXPORT ASSOCIATIONS

DUE WITHIN 30 DAYS AFTER CREATION.

1. Name

Address

(Here insert address of principal office.)

2. *Statement.*—This corporation or association was organized or entered into for the sole purpose of engaging in export trade and is now or about to be solely engaged in the export trade as defined in the Export Trade Act, approved April 10, 1918, viz.: "Trade or commerce in goods, wares or merchandise exported or in the course of being exported from the United States or any territory thereof, to any foreign nation."

3. There is hereunto annexed and made a part hereof a schedule, showing in paragraph "A" *the location of its offices or places of business*; in paragraph "B," *the names and addresses of all its officers and directors*; in paragraph "C," *the names and addresses of all its stockholders or members*; in paragraph "D," *the products to be exported*; and in paragraph "E," *the capital authorized and paid in*.

4. There is also annexed (F) a brief statement describing its methods and plan under which it is doing business, a statement of its relations with other associations, corporations and individuals, and such other information as this company or association deems should be in the export files of the Federal Trade Commission.

5. If a corporation, a copy of its certificate or articles of in-

corporation and by-laws is annexed and filed, and if unincorporated, a copy of its articles or contract of association.

 By -----
 State of ----- }
 County of ----- } ss:

-----, being first duly sworn, on oath deposes and says that he is an officer, to wit, ----- of the above-named corporation or association; that he has read the foregoing report and schedules annexed and that the same are in all respects true and correct.

(Verifying officer sign here.)
 Subscribed and sworn to before me this
 ----- day of -----, 19-----

Notary Public.

Schedule 1.

(A) The following are the locations of all offices and places of business:

(B) The following were officers or directors, as at January 1, 1919:

Names.	Office Held.	Addresses.
-----	-----	-----
-----	-----	-----

(C) The following were stockholders or members, January 1, 1919:

Names.	Addresses.	Number of shares.
.....
.....

(D) It desires to be classified as engaged in exporting the following products, viz.:

.....

.....

(Please limit to products now or about to be exported and supplement by letter when others are taken on.)

(E) Capital:

(1) Authorized preferred, \$.....; par value, \$.....;
issued, \$.....; paid in, \$.....

(2) Authorized common, \$.....; par value, \$.....;
issued, \$.....; paid in, \$.....

(F) The following briefly describes the methods and plan under which our business is done and states our relations with other associations, corporations and individuals, with such other information as we deem should be in the export files of the Federal Trade Commission:

.....

.....

Notes

1. The information required by this report is to be furnished to the Federal Trade Commission under "An Act to promote export trade, and for other purposes," approved April 10, 1918, (the Export Trade Act), which provides in section 5 thereof as follows:

Sec. 5. That every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management and relation to other associations, corporations, partnerships and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. * * *

2. The word "association" wherever used in the "export trade act" or in this report means "any corporation or combination, by contract or otherwise, of two or more persons, partnerships or corporations."

EXHIBIT XII.

FORM FOR ANNUAL REPORT FROM EXPORT ASSOCIATION.

FEDERAL TRADE COMMISSION

WASHINGTON, D. C.

REPORT FROM EXPORT ASSOCIATIONS

DUE JANUARY 1, 1919, OF:

1. Name

Address

(Here insert address of principal office.)

2. *Statement.*—This corporation or association was organized or entered into for the sole purpose of engaging in export trade and is now solely engaged in the export trade as defined in the Export Trade Act, approved April 10, 1918, viz.: "Trade or commerce in goods, wares or merchandise exported or in the course of being exported from the United States or any territory thereof, to any foreign nation."

3. There is hereunto annexed and made a part hereof a schedule, showing in paragraph "A" *the location of its offices or places of business*; in paragraph "B," *the names and addresses of all its officers and directors*; in paragraph "C," *the names and addresses of all its stockholders or members*; in paragraph "D," *all amendments to and changes in its articles or certificate of incorporation, or articles or contract of association and by-laws, since its last report to the Federal Trade Commission.*

4. There is also annexed (E) a brief statement describing its methods and plan under which it is doing business, a statement of its relations with other associations, corporations and individuals, and such other information as this company or association

deems should be in the export files of the Federal Trade Commission.

By.....

State of }
County of } ss:

....., being first duly sworn, on oath deposes and says that he is an officer, to wit, of the above-named corporation or association; that he has read the foregoing report and schedules annexed and that the same are in all respects true and correct.

.....
(Verifying officer sign here.)

Subscribed and sworn to before me this
.....day of, 19.....

.....
Notary Public.

Schedule 1.

(A) The following are the locations of all offices and places of business:

.....
.....

(B) The following were officers or directors, as at January 1, 1919:

Names.	Office Held.	Addresses.
.....
.....

(C) The following were stockholders or members January 1, 1919:

Names.	Addresses.	Number of Shares.
--------	------------	-------------------

(D) Since the last report to the Federal Trade Commission the articles of or certificate of incorporation, articles of association and by-laws have been amended or changed as follows:

(E) The following briefly describes the methods and plans under which our business is done and states our relations with other associations, corporations and individuals, with such other information as we deem should be in the export files of the Federal Trade Commission:

Notes

1. The information required by this report is to be furnished to the Federal Trade Commission under "An Act to promote export trade, and for other purposes," approved April 10, 1918, (the Export Trade Act), which provides in section 5 thereof as follows:

Sec. 5. That every association now engaged solely in export trade, within sixty days after the passage of this Act, and every association entered into hereafter which engages solely in export trade, within thirty days after its creation, shall file with the Federal Trade Commission a verified written statement setting forth the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members, and if a corporation, a copy of its certificate or articles of incorporation and by-laws, and if unincorporated, a copy of its articles or contract of association, and on the first day of January of each year thereafter it shall make a like statement

of the location of its offices or places of business and the names and addresses of all its officers and of all its stockholders or members and of all amendments to and changes in its articles or certificate of incorporation or in its articles or contract of association. It shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management and relation to other associations, corporations, partnerships and individuals. Any association which shall fail so to do shall not have the benefit of the provisions of section two and section three of this Act, and it shall also forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the association has its principal office, or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of the forfeiture. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. * * *

2. The word "association" wherever used in the "export trade act" or in this report means "any corporation or combination, by contract or otherwise, of two, or more persons, partnerships or corporations."

EXHIBIT XIII.

APPLICATION FOR INCORPORATION UNDER EDGE ACT.¹

Application for Approval and Reservation of Title of a Corporation Proposed to be Organized under the Terms of Section 25(a) of the Federal Reserve Act.

....., 19.....

¹Federal Reserve Board Form 150.

To the *FEDERAL RESERVE BOARD*,
Washington, D. C.

Sirs :

We, the undersigned, prospective shareholders, being natural persons and of lawful age, intend, with others, to organize a corporation under the terms of Section 25(a) of the Federal Reserve Act under the title of
 the home office to be located at

We request that this title be approved by the Federal Reserve Board and reserved for a period of thirty days, and that all correspondence with reference to this application be addressed to

Very truly yours,

EXHIBIT XIV.

ARTICLES OF ASSOCIATION UNDER EDGE ACT.¹

*Banking Corporations Authorized to do Foreign Banking Business
 Under Section 25(a) of the Federal Reserve Act.*

ARTICLES OF ASSOCIATION.

*For the purpose of organizing a corporation to carry on the
 business of international or foreign banking or other international*

¹Federal Reserve Board Form 151. -

or foreign financial operations, under Section 25(a) of the Federal Reserve Act, the undersigned subscribers for the stock of the corporation hereinafter named do enter into the following articles of association:

First: The title of this corporation shall be "....."

Second: This corporation is being organized for the purpose of engaging in the business of international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the agency, ownership or control of local institutions in foreign countries, or in such dependencies or insular possessions, and for the purpose of acting, when required by the Secretary of the Treasury, as fiscal agent of the United States.

Third: The operations of this corporation shall be carried on in the following place or places :

Fourth: The home office of this corporation shall be located in the United States, at

Fifth: The Board' of Directors shall consist of members. The first meeting of the stockholders for the election of directors shall be at on the or at such other place and time as a majority of the undersigned stockholders may direct.

Sixth: The regular annual meeting of the stockholders for the election of directors shall be held each year in the United States, at the home office of the corporation, upon the date fixed by the directors in the by-laws of the corporation, and all elections shall be held according to such regulations as may be prescribed by the Board of Directors not inconsistent with the provisions of Section 25(a) of the Federal Reserve Act, and of these articles.

Seventh: The capital stock of this corporation shall be

The capital stock may, with the approval of the Federal Reserve Board, be increased at any time by a vote of two-thirds of the stockholders, or by unanimous consent in writing of the stockholders without a meeting and without a formal vote, according to the provisions of the aforesaid Act of Congress.

Eighth: The Board of Directors, all of whom shall be citizens of the United States, and a majority of whom shall be a quorum to do business, shall have power to appoint such officers and employees as it may deem necessary to transact the business of the corporation, to fix salaries to be paid to them, to continue them in office, or to dismiss them whenever the interests of the corporation may demand, and to appoint others to fill their places.

The directors shall have power to define the authority and the duties of the officers and employees of the corporation, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the election; to make all by-laws that it may be proper for them to make, not inconsistent with law and with the regulations of the Federal Reserve Board, for the general regulation of the business of the corporation and the management of its affairs, and generally to do and perform all acts that it may be legal for the Board of Directors to do and perform under the aforesaid Act of Congress.

Ninth: A majority of the shares of the capital stock of this corporation shall at all times be held and owned by citizens of the United States, by corporations the controlling interest in which is owned by citizens of the United States, chartered under the laws of the United States, or of a State of the United States, or by firms or companies the controlling interest in which is owned by citizens of the United States, and provision shall be made in the by-laws for the enforcement of this requirement.

Tenth: This corporation shall continue for a period of twenty years from the date of the execution of its organization certificate, unless sooner dissolved by an act of its stockholders owning at least two-thirds of its stock, or by an Act of Congress, or unless its franchise becomes forfeited by some violation of law; but it may at any time within two years next previous to the date of

the expiration of its corporate existence, by vote of the stockholders owning two-thirds of its stock, apply to the Federal Reserve Board for its approval to extend the period of its corporate existence for a term of not more than twenty years.

Eleventh: These articles of association may be changed or amended at any time by stockholders owning a majority of the stock of the corporation in any manner not inconsistent with law and the regulations of the Federal Reserve Board; and the Board of Directors, or any three stockholders, may call a meeting of the stockholders for this or any other purpose not inconsistent with law by publishing notice thereof for thirty days in the newspaper published in the town, city or county in the United States where the home office of the corporation is located, or by mailing to each stockholder notice in writing thirty days before the time fixed for the meeting.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this day of, 19.....

(To be signed and sealed by at least five natural persons, comprising a majority of the applicants.)

SIGNATURE.

ADDRESS.

.....	[SEAL]
.....	[SEAL]
.....	[SEAL]
.....	[SEAL]
.....,	[SEAL]
.....	[SEAL]
.....	[SEAL]

EXHIBIT XV.

ORGANIZATION CERTIFICATE UNDER EDGE ACT,¹

*Banking Corporations Authorized to do Foreign Banking Business
under Section 25(a) of the Federal Reserve Act.*

Charter No.

¹Federal Reserve Board Form 152.

ORGANIZATION CERTIFICATE.

We, the undersigned, whose names are specified in Article Five of this certificate, having associated ourselves for the purpose of organizing a corporation for carrying on the business of international or foreign banking or other international or foreign financial operations, under Section 25(a) of the Federal Reserve Act, do make and execute the following organization certificate:

First: The title of this corporation shall be "....."

Second: The operations of this corporation shall be carried on in the following place or places:

Third: The home office of this corporation shall be located in the United States at

Fourth: The capital stock of this corporation shall be

Fifth: The name, the place of business or residence of each person executing this certificate and the number of shares of this corporation to which each has subscribed, are as follows:

Name.	Place of Business or Residence. (Town or City, and State.)	Number of Shares.
1.
2.
3.
4.
5.
6.
7.
8.

9.
10.
11.
12.
13.
14.
15.
16.
17.
18.
19.
20.

Sixth: This certificate is made in order that we may avail ourselves, and in order that all other persons, firms, companies and corporations who or which may hereafter subscribe to or purchase the shares of the capital stock of this corporation may avail themselves, of the advantages of the aforesaid Section 25(a) of the Federal Reserve Act.

IN WITNESS WHEREOF, we have hereunto set our hands this
.....day of, 19.....

(To be signed and acknowledged by those who have signed the articles of association.)

1.
2.
3.
4.
5.

6.
7.
8.
9.
10.
11.
12.
13.
14.
15.
16.
17.
18.
19.
20.

(Acknowledgment must be made before a Judge of Court of Record or Notary Public.)

State of }
 County of } ss:

Before the undersigned, a of
 personally appeared

.....
 to me well known, who severally acknowledge that they executed the foregoing Certificate for the purposes therein mentioned.

Witness my hand and seal of office this
day of, 19.....

.....

EXHIBIT XVI.

CONSOLIDATED STEEL CORPORATION.¹

CERTIFICATE OF INCORPORATION.

First: The name of this corporation is

Consolidated Steel Corporation.

Second: The location of its principal office in the State of Delaware is No. 7 West Tenth Street, in the City of Wilmington, County of New Castle. The name of its resident agent is the Corporation Trust Company of America, and the address of said agent is No. 7 West Tenth Street, City of Wilmington, County of New Castle, State of Delaware.

Third: The objects and purposes for which and for any of which this corporation is formed are, to do any or all of the things herein set forth to the same extent as natural persons might or could do, viz.:

To engage solely in export trade as the term export trade is defined in the Act of Congress approved April 10, 1918, entitled, "An Act to promote export trade, and for other purposes," commonly known as the "Webb Act," namely, "trade or commerce in goods, wares or merchandise exported or in the course of being exported from the United States or any Territories thereof to any foreign nation," and as defined in any and all Acts of Congress amendatory of or supplementary to said Webb Act, and, in connection with such trade, to do any and all things necessary and incidental thereto, including the following, provided that this corporation shall not have power to do any act or thing because of the doing of which it would be deemed to be engaging in business other than export trade as defined by the said Webb Act and any and all acts amendatory thereof or supplementary thereto:

To buy and sell for its own account merchandise of every kind

¹Published with the kind permission of the Consolidated Steel Corporation.

and nature, for exportation and to export the same, from the United States to all foreign countries.

To buy and sell merchandise of every kind and nature for exportation, and to export the same, from the United States to all foreign countries, for the account of others, and incidental thereto to make advances on consignments of such merchandise, or to hypothecate the same.

To act commercially and generally as agent for other corporations, partnerships, associations and individuals, to the extent permitted by the corporation laws of Delaware hereinafter referred to.

To charter, purchase or otherwise acquire any interest in vessels, both for the account of itself and for the account of others, for the carrying of freight or passengers between the United States and any foreign country and between any foreign countries; and to operate such vessels.

To contract for and engage in the construction in any foreign country of any structure or article made entirely or partly of any article exported by this corporation.

To appoint agents and representatives in all parts of the world for the purpose of carrying on any and all of the objects of this corporation.

To acquire by purchase, subscription or otherwise, to invest in, hold for investment or otherwise, and to sell, exchange, mortgage, pledge, or otherwise dispose of, either the whole or any part of the shares of stock, bonds and other evidences of indebtedness, obligations and contracts of any corporation, public, quasi public or private, domestic or foreign, and all trust or other certificates of, or receipts evidencing, interest in any such securities; to issue in exchange therefor its own stock, bonds and other obligations, and while owner of any such stocks, bonds and other evidences of indebtedness or interest therein, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon for any and all purposes.

To aid, by loan, subsidy, guaranty, or in any other manner whatsoever, any corporation whose stocks, bonds, securities or other obligations are in any manner held or guaranteed, and to

do any and all other acts or things toward the preservation, protection, improvement or enhancement in value, of any such stocks, bonds, securities or other obligations, and to do all and any such acts or things designed to accomplish any such purpose.

To acquire the good will, rights, property and franchises of any person, firm, association or corporation, and to pay for the same in cash or bonds of this corporation, or otherwise, and to hold or in any manner dispose of the whole or any part of the property so acquired.

To borrow money and issue bonds, debentures or obligations of this corporation from time to time for any of the objects or purposes of the corporation, and to secure the same by mortgage, pledge, deed of trust, or otherwise.

To have one or more offices, to carry on any or all of its operations and business, and without restriction or limit as to amount to purchase or otherwise to acquire, hold, own, mortgage, sell, convey or otherwise dispose of, real and personal property of every class and description in any of the states, districts, territories or colonies of the United States and in any and all foreign countries, subject to the laws of such state, territory, colony or country.

To do any and all things necessary in order to realize the purposes herein set forth, and, in general, to carry on any other business in connection with the foregoing and to have and to exercise all the powers conferred by the corporation laws of Delaware hereinafter referred to.

The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation.

Fourth: The total authorized capital stock of this corporation is Ten Million Dollars (\$10,000,000), divided into one hundred thousand (100,000) shares of the par value of One Hundred Dollars (\$100) each.

The amount of the capital stock with which this corporation will commence business is the sum of One Thousand Dollars

(\$1.000), being ten (10) shares of the par value of One Hundred Dollars (\$100) each.

Fifth: The name and place of residence of each of the original subscribers to the capital stock, are as follows:

Name	Residence	Number of Shares
C. L. Rimlinger	Wilmington, Delaware	8
M. M. Clancy	Wilmington, Delaware	1
P. B. Drew	Wilmington, Delaware	1

Sixth: This corporation is to have perpetual existence.

Seventh: The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Eighth: The stockholders, or any number of them, may, for limited periods not exceeding five (5) years each, deposit their stock with, or transfer the same to, a trustee or trustees on such terms and conditions, and with such powers as may be agreed upon by such stockholders in a written agreement (a copy of which shall be filed with the corporation) in order to carry out particular policies intended to promote the best interests of all the stockholders.

Ninth: In so far as the same is not contrary to the laws of Delaware, no contract or other transaction between the corporation and any other corporation shall be affected or invalidated by the fact that any one or more of the directors of this corporation is or are interested in, or is a director or officer, or are directors or officers of such other corporation and any director or directors, individually or jointly, may be a party or parties to, or may be interested in, any contract or transaction of this corporation or in which this corporation is interested; and no contract, act or transaction of this corporation with any person or persons, firm or corporation, shall be affected or invalidated by the fact that any director or directors of this corporation is a party, or are parties to or interested in such contract, act or transaction, or in any way connected with such person or persons, firm or association, and each and every person who may become a director of this corporation is hereby relieved from any liability that might otherwise exist from contracting

with the corporation for the benefit of himself or any firm, association or corporation in which he may be in anywise interested. Directors so interested shall be counted when present at directors meetings for the purposes of determining the existence of a quorum and may vote at such meetings as fully and with the same effect as if not so interested.

Tenth: This corporation reserves the right to amend, alter, change or repeal any provision contained in this certificate of incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred on stockholders herein are granted subject to this reservation.

WE, THE UNDERSIGNED, being each of the original subscribers to the capital stock hereinbefore named for the purpose of forming a corporation to do business both within and without the State of Delaware, and in pursuance of The General Corporation Law of the State of Delaware, being Chapter 65 of the Revised Code of Delaware, and the acts amendatory thereof, and supplemental thereto, do make and file this certificate hereby declaring and certifying that the facts herein stated are true, and do respectively agree to take the number of shares of stock hereinbefore set forth, and accordingly have hereunto set our hands and seals this 2nd day of January, A. D. 1919.

In presence of Lawrence J. Broman.

C. L. RIMLINGER,	(Seal)
M. M. CLANCY,	(Seal)
P. B. DREW.	(Seal)

MEMBER COMPANIES' AGREEMENT

(Dated December 24, 1918.)

WITH APPENDED FORM OF
TRUST AGREEMENT

(Dated January 2, 1919.)

THIS AGREEMENT, made the 24th day of December, 1918, between Bethlehem Steel Company, Lukens Steel Company and

Sharon Steel Hoop Company, Pennsylvania Corporations; Lackawanna Steel Company, a New York Corporation; Midvale Steel and Ordnance Company, a Delaware Corporation; Republic Iron and Steel Company, a New Jersey Corporation; The Brier Hill Steel Company, The Trumbull Steel Company and The Youngstown Sheet and Tube Company, Ohio Corporations; Whitaker-Glessner Company, a West Virginia Corporation, and such others as may become parties hereto in the manner hereinafter provided, each such party being hereinafter called Member Company and the aggregate of such parties, Member Companies,

WITNESSETH :

WHEREAS, the Member Companies in connection with the export of certain of their products desire to avail themselves of the benefits of the Act of Congress approved April 10, 1918, entitled "An Act to Promote Export Trade and For Other Purposes", commonly known as the "Webb Act", and to associate generally as far as they legally may for the purpose of promoting their export business,

NOW, THEREFORE, the Member Companies severally agree each with the other as follows :

1. A corporation (hereinafter called the "Export Company") shall be organized under the laws of Delaware, with an authorized capital stock of at least Ten Million Dollars (\$10,000,000), divided into shares of the par value of \$100 per share, all common, with a perpetual corporate life, and with such charter powers as will enable it to do a general export business, and to effectuate the purpose of this agreement. The capital stock shall be subscribed for and taken by the Member Companies severally in the amounts set opposite their respective names as follows :

<i>Name</i>	<i>Number of Shares</i>	<i>Amount</i>
Bethlehem Steel Company		
Lackawanna Steel Company		
Lukens Steel Company		
Midvale Steel and Ordnance Company		
Republic Iron and Steel Company.....		
Sharon Steel Hoop Company		
The Brier Hill Steel Company		
The Trumbull Steel Company		
The Youngstown Sheet and Tube Company		
Whitaker-Glessner Company		

Payments shall be made on such subscriptions as and when called for in writing by or under the authority of the board of directors of the Export Company.

The stock so taken shall be received and held on the terms and conditions provided for in this agreement, particularly but not exclusively the following:

(a) Each Member Company shall deposit such stock, and also all additional like stock which it may hereafter acquire, with trustees, under a trust agreement, in the form hereto annexed as Schedule "A" and hereof made a part.

(b) The trustees at any time during the life of the trust agreement when advised by the Export Company that any Member Company is in default under this agreement shall have the right upon a three-fourths vote of their entire number taken after ten (10) days' notice to such Member Company and opportunity accorded to be heard, to buy the trust certificates of such Member Company (in whole but not in part) for the sum paid by such Member Company on or for the stock thereby represented plus such portion of the then surplus earnings of the Export Company, if any, which, if such surplus earnings should then be declared out as a dividend, would be payable under the trust agreement to said vendor Member Company, or less such part of the deficit of the Export Company, if any, which would then be contributable to under the trust agreement by said vendor Member Company, if contribution should then be assessed, as provided in said agreement, and less also any other sums then owing from said vendor Member Company to the trustees or the Export Company; and during the same time no Member Com-

pany shall sell or pledge, or otherwise dispose of or encumber any such trust certificates, save with the written consent of three-fourths of the trustees. All funds required for each such purchase from a Member Company shall at the written request of the trustees be supplied by the other Member Companies as provided for in the trust agreement.

(c) No Member Company shall own trust certificates representing either more or less of the stock of the Export Company than shall bear the same ratio to the total stock of the Export Company issued and outstanding, that the tonnage of products last promised by such Member Company to the Export Company pursuant to sub-paragraph (a) of paragraph 3 of this agreement bears to the total tonnage of products so promised by all of the Member Companies. Adjustments to this end shall be made by the trustees on an equitable basis every December 31st and any Member Company refusing to comply therewith shall be deemed in default under this agreement.

Appropriate notation of these conditions, including specific reference to this agreement, shall be made upon all trust certificates, and all purchasers of such certificates shall be bound by these conditions.

Whenever so directed in writing by the holders of three-fourths in interest of the trust certificates then outstanding, the trustees shall cause the Export Company to be dissolved; and in such case may vote upon the deposited stock in favor of or may consent to such dissolution.

2. The board of directors of the Export Company shall consist of not less than ten (10) nor more than fifteen (15) directors to be chosen as provided in the trust agreement except that the directors for the first year shall be the following persons:

E. A. S. Clarke, A. C. Dinkey, E. G. Grace, John A. Topping, James A. Campbell, A. F. Huston, W. A. Thomas, C. H. McCullough, Jr., Severn P. Ker, Jonathan Warner, Alexander Glass.

There shall be an executive committee, consisting of not less than six (6) directors, selected from among their number by the board of directors, and proper provision shall be made therefor in the certificate of incorporation or by-laws of the Export Company. The members of such committee shall be compensated for

their services as the board of directors shall determine. No Member Company shall have more than one representative on such executive committee at any one time.

The board of directors shall have authority to establish such bonus or percentage system of compensation for officers, heads of departments and other employees of the Export Company, and to administer the same as they may deem advisable, provided that no officer or head of department or other employee entitled under any such system to share in any such compensation who may also be a director of the Export Company shall take any part as a director in determining the total amount of such compensation at any time to be distributed or his own share in any such distribution.

3. Products of the Member Companies shall be available to the Export Company as follows:

(a) On the execution of this agreement, and on or before every September 30th thereafter while this agreement is in effect, each Member Company shall furnish the Export Company with a written list of its merchant steel and iron products (hereinafter called promised products) which by the presentation of such list it shall promise, subject to government control and regulation, to the Export Company in the quantities therein specified, for the following calendar year. The total quantity so promised shall be ten per centum (10%) of the promisor's total output of all finished products. Each such list must in the opinion of the board of directors of the Export Company be representative of the products of the Member Company furnishing it.

(b) The entire tonnage of products so promised shall be available to the Export Company for shipment or otherwise in approximately equal monthly installments; provided, however, that any monthly installment or part thereof which the board of directors of the Export Company may decide will not be needed by the Export Company shall be released in writing by the Export Company to the promisor or promisors thereof as soon as possible after such decision is reached but not later than the first day of the month in which such installment is to be shipped; and provided, further, that any monthly installment or part thereof not taken by the first day of said month by the Export Company for shipment or otherwise shall automatically cease to be available to the Export Company and shall become available

to the promisor or promisors thereof as fully as if never promised to the Export Company.

(c) All orders for products so promised, booked by the Export Company, shall promptly be divided among the Member Companies so far as practicable in such manner that the total quantity of each product so ordered during each calendar year shall be supplied by the Member Companies pro rata according to the total quantity of such product promised by each Member Company for such calendar year.

(d) Whenever, from time to time, the Export Company can dispose of more tonnage than is promised to it, the board of directors of the Company shall determine and advise the Member Companies in writing, what additional tonnage is desired, whereupon each Member Company shall have the right to elect in writing within ten (10) days from such notice, to supply so much of the additional amount of each product desired, as the amount of each Member Company's promise of said product is of the total amount thereof promised by all the Member Companies, or any part of such proportion. And if any Member Company shall elect not to supply any part or all of its full share of such additional tonnage, so determined, such share or part of such share may be supplied by the Member Companies electing to supply their full shares, pro rata according to their full shares. Election by a Member Company not to contribute additional tonnage shall not constitute or be deemed a failure of performance under this agreement.

Purchase by the trustees of the trust certificates of a Member Company shall automatically end the duty of such Member Company further to keep its promise of products to the Export Company, and to make any further promise of products, and to contribute to any deficits of the Export Company, and shall also terminate all right of such Member Company to participate in any earnings of the Export Company, and to require the Export Company to receive any products theretofore ordered by the Export Company.

4. No Member Company shall directly, or indirectly, export any of its products at any time promised as provided in subparagraph (a) of paragraph 3 hereof, otherwise than through the sale thereof as herein provided to the Export Company except such products as may be specifically excepted in writing by

the Export Company, approved by resolution of the board of directors of the Export Company; but any products so excepted may by subsequent agreement with the Export Company be subjected to the restrictions of this paragraph 4, and thereafter shall remain so subject unless reexcepted by the board of directors of the Export Company. The Export Company may buy any article whatsoever from, or otherwise deal with individuals, firms and corporations or associations other than the Member Companies, and also may buy from the Member Companies any of their products not promised to the Export Company, and otherwise deal with Member Companies with respect to such products, but not to the detriment of the other Member Companies, as determined by the board of directors of the Export Company.

5. All promised products taken by the Export Company and all additional tonnage supplied to it as provided in subparagraph (d) of paragraph 3 hereof, shall be paid for by the Export Company as follows:

(a) The Export Company shall submit to the Member Companies during the last fortnight of each calendar quarter of each calendar year a list of estimated prices for all promised products which shall be based on current and prospective selling prices obtainable by the Export Company, which shall be known as the provisional prices for the ensuing calendar quarter, all such prices to be stated in United States currency and per ton of 2240 pounds or per 100 pounds net, or per usual unit, according to custom. All such prices shall be base prices and subject to such extras and differentials as the board of directors of the Export Company may establish.

(b) All orders for promised products and for additional tonnage placed by the Export Company with Member Companies shall be governed by the provisional prices for the quarter during which the orders are so placed, even though the deliveries required by the orders may extend over into a subsequent quarter or quarters but such deliveries shall not extend for more than two (2) calendar quarters beyond the quarter in which the order was placed, except by consent of the Member Company with which such order is placed.

(c) Each Member Company shall invoice the promised products and all additional tonnage so ordered, which it delivers to,

or as directed by, the Export Company, at the governing provisional prices f. o. b. the Member Company's mill with freight to point of export from the United States allowed to the Export Company and with such extras and differentials as the board of directors of the Export Company may establish; all invoices to be accompanied by such other papers and data as the board of directors of the Export Company shall prescribe.

(d) The Export Company shall pay the Member Companies * * * of the value of such invoice in net cash within thirty days from the date of invoice, and the remaining * * * to be retained to defray overhead and general expenses of the Export Company, as defined and fixed by the board of directors thereof, on or before the last day of the calendar quarter succeeding that in which the * * * payment is made, except as hereinafter in subparagraph (e) of this paragraph otherwise provided. The Export Company shall bear all charges for freight beyond the point of export, ocean freight, insurance, exchange, commissions, interest, *et cetera*, in connection with all products shipped from Member Companies' mills and shall assume all risks in connection with credits and collections.

(e) The Export Company shall prepare and submit to each of the Member Companies in writing within the first month of any calendar quarter, a summary statement showing all prices obtained by the Export Company for all products shipped and invoiced by the Export Company during the preceding calendar quarter, less all charges for freight beyond the point of export, ocean freight, insurance, exchange, commissions, interest, *et cetera*, together with the average price for each product based thereon and the net amount received at the point of export for the total tonnage of each product so shipped and invoiced. The difference between such net amount so received for the total of each product so shipped and invoiced and the total amount of the invoices of Member Companies against the Export Company for said products, shall constitute a bonus to be divided among the Member Companies shipping said products or a penalty payable by such Member Companies to the Export Company as the case may be. Such bonus shall be paid to such Member Companies or, if a penalty, shall be assessed against such Member Companies, in the proportions that the total of each such Member Company's said invoices is of the aggregate of said invoices during said quarter. All sums so found payable to Member Companies shall be paid by the Export Company on or before the last day of the then current calendar quarter. All

sums so found payable to the Export Company by Member Companies shall be deducted by the Export Company from such sums as may then or thereafter be owing to said Member Companies respectively from the Export Company or paid on demand of the Export Company.

6. The Export Company shall at all times endeavor to sell all promised products and all additional tonnage supplied as provided in sub-paragraph (*d*) of paragraph 3 hereof, at not less than the provisional prices current for the products sold when the orders therefor are booked, but, subject to the provisions of sub-paragraph (*b*) of paragraph 5 hereof lower prices may be quoted and accepted for such products in such quantities and for such periods as the board of directors of the Export Company shall decide.

7. The books of the Export Company shall be audited annually. All dividends which the Export Company may declare shall be paid to the trustees and shall be distributed by the trustees among the holders of trust certificates as provided for in the trust agreement. Any deficits which the Export Company may have, as and when established by said audit, shall in the discretion of the trustees be made up by the holders of trust certificates as provided for in the trust agreement. Immediately upon the termination of the trust agreement all stock then on deposit thereunder shall be returned to the depositors, as provided for in the trust agreement.

8. Any Member Company failing to perform this agreement by refusing to supply promised products as herein provided, or by delay in delivery or faulty condition thereof, or by any other action or inaction, direct or indirect, which the board of directors of the Export Company may consider prejudicial to the Company, or of a character likely to be prejudicial, shall be liable to the Export Company in a sum equal to ten per centum (10%) of the Export Company's gross selling price for such tonnage as liquidated damages, which shall be recouped as far as possible out of any sums then or thereafter owing to such Member Company from the Export Company, any part thereof not so recouped to be paid to the Export Company on demand.

9. The Export Company may on a three-fourths vote of the entire board of directors permit others than the subscribers for stock herein named to acquire its stock, but only upon terms and conditions identical with those herein provided embodied in an agreement in writing between such purchasers of stock and the Export Company, which agreement shall be considered a supplement to this agreement. Any intending purchasers of trust certificates from the trustees pursuant to paragraph 4 of the trust agreement may become parties to this agreement (and subject to all obligations of Member Companies hereunder except the obligation to subscribe and pay for capital stock of the Export Company pursuant to the first paragraph hereof) by executing a counterpart of this agreement as hereinafter provided in paragraph 12, provided that such execution is approved by the trustees by a three-fourths vote of their entire number and is witnessed by an officer of the Export Company thereunto duly authorized.

10. Messrs. E. A. S. Clarke, A. C. Dinkey, E. G. Grace, John A. Topping and James A. Campbell hereby are constituted a Member Companies' committee with power in a majority to determine and conclude, consistently with the terms of this agreement, the details of organization of the Export Company, the terms and form of its certificate of incorporation and by-laws, and any and all matters incidental thereto, including appropriate application to the United States "Capital Issues Committee", pursuant to the act of Congress approved April 5, 1918, known as the "War Finance Corporation Act", all expenses of said Member Companies' committee to be borne by the Export Company.

11. This agreement shall enure to the benefit of the Export Company, and shall be enforceable by and binding on the Export Company in respect of all its terms. It shall continue during the life of the trust agreement or any renewal thereof or substitute therefor as provided in the trust agreement.

12. This agreement may be executed in several counterparts, each of which, when executed by a Member Company and deposited with the above provided Member Companies' committee,

or, after the organization thereof, with the Export Company (to which company said Member 'Companies' committee shall promptly turn over all such counterparts which it may have received), shall be deemed to be an original; and such counterparts so deposited shall together constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto above named have caused this agreement to be executed in their respective corporate names by their respective presidents or vice-presidents and impressed with their respective corporate seals, attested by their respective secretaries or assistant secretaries, as of the day and year first above written.

* * * * *

SCHEDULE A.

TRUST AGREEMENT

THIS AGREEMENT, made the 2nd day of January, 1919, by and between the stockholders of
a Delaware corporation, hereinafter called the Export Company, who may become parties to this agreement in the manner hereinafter provided, parties of the first part, and hereinafter called the Depositors, and
, and
, hereinafter called the Trustees, parties of the second part,

WITNESSETH:

WHEREAS, the Export Company was organized
, 1919, to do a general export business both for its own account and for the account of others, to enable its stockholders to associate in export trade to the extent permitted by law, pursuant to an agreement of association dated December 24, 1918, in the form hereto prefixed and hereof made a part; and

WHEREAS, a deposit with Trustees of all stock issued by the Export Company is required by said agreement of December 24, 1918, and is essential to such association;

Now, THEREFORE, the parties hereto mutually agree as follows:

1. Any record owner of stock of the Export Company may become a party to this agreement by transferring the stock so owned to the Trustees and delivering to them the certificates for such stock duly endorsed in blank or with proper instruments of assignment and transfer, duly executed in blank and in any case properly stamped for transfer. Such transfer and delivery shall have the same force and effect as though the stock owner had in fact subscribed this agreement under seal. Upon the making of such transfer and delivery, the Trustees shall cause a trust certificate or certificates to be issued to such stock owner in substantially the following form:

TRUST CERTIFICATE

THIS IS TO CERTIFY that
has deposited with the undersigned as Trustees
shares of the capital stock of _____, hereinafter
called the Export Company, to be held by the Trustees on the
terms and subject to the conditions of a certain agreement dated
January 2nd, 1919, by and between the owners of stock of the
Export Company and the undersigned Trustees. No stock so
deposited shall be returned to the holder hereof unless and until
this certificate shall be surrendered.

This certificate is transferable only on the books of the Trustees by the registered holder, either in person or by attorney duly authorized, on surrender hereof, and only with the consent of the Trustees, and until such transfer the Trustees may treat the registered holder as owner for all purposes whatsoever.

This certificate is purchasable by the Trustees upon a three-fourths vote of their entire number, at any time within the life of said agreement of January 2nd, 1919, at the price and as provided for in said agreement of January 2nd, 1919, and during said time may not be sold, or pledged, or otherwise disposed of or encumbered save with the written consent of three-fourths of the Trustees. Refusal by the holder hereof to deliver this certificate upon such purchase shall entitle the Trustees to declare this certificate void and to issue a new certificate in its stead.

The interest of the holder hereof in the stock of the Export

est of the then Depositors shall designate in writing within ten days after written notice from the Export Company that such additional places have been created; and in default of such designation such persons shall be appointed or elected as the Trustees shall select.

(b) All dividends declared and paid by the Export Company to the Trustees shall, after deduction of expenses as hereinafter provided in paragraph (9), be paid over by the Trustees to the then Depositors *pro rata* according to their stock holdings represented by their several holdings of trust certificates.

(c) All stock on deposit with the Trustees upon the termination hereof shall be returned by the Trustees to the then Depositors *pro rata* according to their stock holdings represented by their several holdings of trust certificates upon surrender of such certificates.

(d) No increase in authorized capital stock or sale, mortgage or other disposition of the entire properties and franchises of the Export Company, except as hereinafter provided in respect of dissolution of the Export Company, shall be voted for, unless and until a majority in interest of the then Depositors shall have authorized such vote in writing; and no amendment of the certificate of incorporation or by-laws of the Export Company shall be voted for without a similar authorization.

3. The trust certificates to be issued hereunder for deposits of stock shall be transferable only on books of the Trustees to be kept for that purpose, and by the registered holders thereof either in person or by attorney duly authorized, on surrender of the certificates; and the Trustees may treat the registered holder as owner for all purposes whatsoever; but no transfer shall be required to be made or be made in any case unless and until the Trustees shall consent to such transfer by at least a three-fourths vote of their entire number. Except as in this agreement otherwise provided, no stock deposited hereunder shall be either returned to the Depositor or otherwise disposed of by the Trustees.

4. The Trustees shall have the right at any time during the life of this agreement when advised by the Export Company that any Depositor is in default under the prefixed agreement of December 24, 1918, or supplement thereto as provided in paragraph 9 thereof, upon a three-fourths vote of their entire number taken

after ten (10) days' notice to such Depositor and opportunity accorded to be heard, to purchase the trust certificates (in whole but not in part) of such Depositor, at the sum paid by such Depositor on or for the stock represented by such certificates, plus such portion of the then surplus earnings of the Export Company, if any, which, if such surplus earnings should then be declared out as a dividend, would be payable under this agreement to such vendor Depositor, or less such part of the deficit of the Export Company, if any, which would then be contributable to under this agreement by the vendor Depositor if contribution should then be assessed, as provided in this agreement, and less also any other sums then owing from the vendor Depositor to the Trustees or the Export Company; and during the same time no Depositor shall sell or pledge or otherwise dispose of or encumber any of such certificates save with the written consent of three-fourths of the Trustees. In order to make such purchases from Depositors the Trustees shall call upon the other Depositors for the necessary funds, and the other Depositors so called upon shall promptly furnish the same pro rata according to their stock holdings represented by their several holdings of trust certificates. Payment by the Trustees for trust certificates so purchased shall terminate all interest of the vendor Depositor therein and in any and all stock deposited with the Trustees, and in the Export Company, as well as all rights and obligations of the vendor Depositor under the prefixed agreement of December 24, 1918. The certificates purchased shall upon payment therefor be delivered by the vendor Depositor to the Trustees duly endorsed in blank or with proper instruments of assignment and transfer, duly executed in blank, and in any case properly stamped for transfer; and upon such delivery shall be disposed of by the Trustees within thirty (30) days as may be determined by the Trustees by a three-fourths vote of their entire number, except that they shall not be disposed of to any individual, firm, corporation or association, who shall not be or become a party to the prefixed agreement of December 24, 1918. Such disposition shall be at such price as the Trustees by a three-fourths vote of

their entire number shall decide and the proceeds shall be distributed and paid to the Depositors in the proportions in which they contributed funds to enable the Trustees to purchase the certificates so disposed of. If the certificates so purchased are not so disposed of by the Trustees within said period of thirty (30) days, the Trustees shall distribute so many thereof as remain undisposed of among the Depositors in the proportions in which they so contributed funds to the Trustees. Refusal by the vendor Depositor so to deliver the certificates purchased shall entitle the Trustees to declare the undelivered certificates void and to issue new certificates in their stead, to be held or disposed of by the Trustees as the undelivered certificates would have been.

5. No Depositor shall own trust certificates representing either more or less of the stock of the Export Company than shall bear the same ratio to the total stock of the Export Company issued and outstanding that the tonnage last promised by such Depositor to the Export Company pursuant to sub-paragraph (a) of paragraph 3 of the prefixed agreement of December 24, 1918, bears to the total tonnage so promised by all of the Depositors. Adjustments to this end shall be made by the Trustees on an equitable basis every December 31st, and any Depositor refusing to comply therewith shall be deemed in default under the prefixed agreement of December 24, 1918.

6. The Trustees shall cause the Export Company to be dissolved whenever directed so to do in writing by three-fourths in interest of the then Depositors and in such case may vote upon the deposited stock in favor of or may consent to such dissolution.

7. The books of the Export Company shall be audited annually, and any deficits which may be established by said audits shall if and to the extent determined by the Trustees by a three-fourths vote of their entire number be made up by the then Depositors *pro rata* according to their stock holdings represented by their several holdings of trust certificates, the amounts so contributed to be paid by the Trustees to the Export Company.

8. The duly elected or appointed directors of the Export

Company and only such directors, shall be Trustees. Any Trustee may at any time resign by delivering his resignation in writing to his co-trustees to take effect ten days thereafter, provided that by resignation duly accepted he will cease simultaneously to be a member of the board of directors of the Export Company. Any person ceasing to be a director of the Export Company shall automatically cease simultaneously to be a Trustee. In every case of death, resignation or inability of a Trustee to act or in case a vacancy shall be caused by a Trustee ceasing to be a director of the Export Company, the other Trustees shall fill the vacancy so occurring by appointing a successor or successors in writing, provided that such successor or successors shall be the person or persons duly elected or appointed to fill a corresponding vacancy or vacancies in the board of directors of the Export Company. All increases in the number of directors of the Export Company shall be deemed to create vacancies to the extent of such increases among the Trustees, and the persons elected or appointed directors of the Export Company pursuant to such increases in the number of directors shall simultaneously become Trustees hereunder; and all decreases in the number of directors of the Export Company shall correspondingly decrease the number of Trustees hereunder, the persons ceasing to be directors of the Export Company pursuant to such decreases ceasing simultaneously to be Trustees hereunder. The term "Trustees" as used herein, and in any trust certificate or other instrument issued hereunder, shall signify and apply to the parties of the second part and their successors in the trust. Notwithstanding any changes in Trustees, the Trustees for the time being may accept stock deposits and issue trust certificates and otherwise act hereunder in the names of the original Trustees. The Trustees may draft their own rules of procedure, except that the action of a majority of their number taken at meetings duly held, shall govern and have the same effect as action by all, save as herein otherwise provided, and in particular, majority action shall not control where a three-fourths vote of the entire number of the Trustees is hereunder required. Any Trustee may vote at

any meeting either in person or by proxy in writing to any other Trustee or by letter. Whenever vacancies occur among the Trustees, the remaining Trustees may nevertheless act as though no vacancies existed save that such vacancies shall not be deemed to reduce the total number of Trustees where a three-fourths vote of the entire number of Trustees is required by this agreement.

Any Trustee or any firm or association of which he is a member, or any corporation of which he may be a stockholder, director or officer, may contract with the Export Company or be or become pecuniarily interested in any matter or transaction to which the Export Company may be a party or in which it may in any way be concerned, as fully as though he were not a Trustee.

The Trustees assume no responsibility for the management or any consequences of the management of the Export Company by the directors whom they shall elect, or for the consequences of any vote cast or other action taken by them as stockholders of the Export Company pursuant thereto, provided they cast such votes and take such action in the exercise of their best judgment and in good faith. The Trustees may appoint such agents and employ such persons as they may deem necessary to assist them in the performance of this trust, and shall not be personally liable for any act or omission of any person so employed by them, reasonable care having been exercised in the selection of such person. The Trustees shall not incur any responsibility for any error of law or fact, or for anything done or omitted under this agreement, except that each Trustee shall be liable for the consequences of his own individual negligence or wilful wrong.

The Trustees shall be fully empowered to act, and fully protected from all liability in acting, upon any writing or instrument believed by them to be genuine, and may accept any written demand, request, notice or other writing of the Export Company pursuant to this agreement, if executed by the President or any Vice-President of the Company under the corporate seal, attested by the Secretary or an Assistant Secretary.

All determinations by the Trustees of the proportions dividends received by them from the Export Company, payable to the Depositors, and of the amounts of any surpluses or deficits of the Export Company, shall be final and conclusive.

9. The Trustees shall act under this agreement without compensation, but on their demand shall be reimbursed, from time to time, by the then Depositors for all reasonable expenses and disbursements hereunder, or at their option, may reimburse themselves for expenses incurred and disbursements made out of any dividends received from the Export Company, before paying over such dividends to the then Depositors. The Depositors called upon for such reimbursement shall be liable therefor *pro rata* according to their stock holdings represented by their several holdings of trust certificates.

10. The GUARANTY TRUST COMPANY OF NEW YORK is hereby appointed the agent and depository of the Trustees to receive deposits of certificates of the capital stock of the Export Company and to execute and issue trust certificates as agent for, and in the name of, the Trustees, and to transfer said trust certificates, until such time as said Guaranty Trust Company of New York shall resign or be dissolved or otherwise disqualified from acting in such capacity, in any of which events the agent and depository appointed by the Trustees as hereinafter provided shall then exercise like functions.

If, through the resignation, dissolution or disability of said Guaranty Trust Company of New York to act as agent or depository of the Trustees hereunder, it shall, in the opinion of the Trustees, be advisable at any time during the continuance of this agreement to appoint another agent or depository, the Trustees shall have the full authority to make such appointment; provided that such agent or depository shall be a national bank or trust company having an office in the Borough of Manhattan, City and State of New York; and the Trustees shall forthwith, upon such appointment, file with the Export Company a written notice thereof.

The Guaranty Trust Company of New York shall incur no liability as the agent and depository of the Trustees by anything

done or permitted to be done at the request or permission of the Trustees, said capital stock of the Export Company deposited as above provided being intended to be wholly at the order and wholly under the control of the Trustees, and said Guaranty Trust Company of New York shall incur no liability whatsoever, except for its own wilful misconduct.

11. Any notice, offer, request, demand or communication hereunder provided to be given to or made upon the Trustees, shall be made in writing addressed to the Trustees at the New York office of the Export Company, and any notice, offer, request of the then Depositors lodged with the Trustees at least sixty (60) days before the time of such expiration, this agreement shall be deemed renewed for an additional period of * * *.

12. This agreement shall continue in force and effect for a period of * * * from the date first above written, unless sooner terminated by the dissolution of the Export Company or the unanimous action of the then Depositors. Upon the written request of all of the then Depositors lodged with the Trustees at least sixty (60) days before the time of such expiration this agreement shall be deemed renewed for an additional period of * * *.

13. This agreement may be simultaneously executed by the Trustees in several counterparts, each of which, so executed, shall be deemed to be an original; and such counterparts shall together constitute one and the same instrument.

IN WITNESS WHEREOF, the Trustees have hereunto set their hands and seals as of the day and year first above written, and the parties of the first part have transferred and delivered their stock and accepted certificates issued under this agreement.

Trustees.

EXHIBIT XVII.

NAMUSA SOUTH AMERICAN CORPORATION.¹

CERTIFICATE OF INCORPORATION.

We, the undersigned, all being of full age and citizens of the

¹Published with the permission of the Namusa Corporation.

trade or commerce in, or otherwise dispose of products which are for export, or are to be exported, or are in the course of being exported, or have been exported from the United States or any territory thereof to any foreign nation;

(g) To purchase, lease, charter or acquire, build, erect, maintain, operate and manage offices, warehouses, docks and other plant and equipment for the purposes of the corporation;

(h) To buy, or otherwise acquire, hold, lease, sell, exchange, mortgage, pledge or otherwise dispose of any property, real or personal, rights, franchises or good will, which the purposes of the corporation shall require, subject to such limitations as may be prescribed by law;

(i) To borrow or raise money for the purposes of the corporation, to secure the same and any interest thereon and for that purpose or for any other purpose permitted by law and subject to the restrictions and conditions thereby imposed, to mortgage and charge all or any part of the property, rights and franchises of the corporation and to issue, sell, pledge or otherwise dispose of its notes, bonds, debentures and other evidences of indebtedness and to draw, make, accept, endorse, execute and issue promissory notes, bills of exchange, warrants and other negotiable or transferable instruments;

(j) To make, purchase or otherwise acquire, deal in and carry out any contracts for, or in relation to any of the foregoing purposes of this corporation that may be necessary and lawful;

(k) To conduct and transact the business of the corporation in any or all of its branches in the State of New York or elsewhere and to do any and all things necessary, suitable and proper for the accomplishment of any of the purposes hereinbefore set out, either alone or in association with other corporations, firms or individuals, and to do every other act or acts incidental to the aforesaid purposes, and which may now or hereafter be lawful for the corporation to do or exercise under and in pursuance of the Business Corporations Law of the State of New York, or any other law that may now or hereafter be applicable to the corporation;

(l) The foregoing clauses shall be construed both as objects

and powers and the enumeration of specific powers shall not be held to limit or restrict, in any manner, the general powers of the corporation and the enjoyment thereof as conferred by the laws of the State of New York or of the United States and the objects and powers specified in any clauses shall, except where otherwise expressed, be in no wise limited or restricted by reference to, or in reference from, the terms of any other clause, but the objects and powers specified in each of the clauses shall be regarded as independent purposes and powers; *Provided, however,* that the same be, in all respects, subject to, governed by, and not inconsistent with the laws under which the corporation is organized and the Act of Congress, entitled "An Act to promote export trade, and for other purposes," (Public 126, 65th Congress) approved April 10, 1918, and any acts amendatory thereof or supplementary thereto and any and all lawful orders and regulations of the Federal Trade Commission made thereunder.

Third: The total number of shares of capital stock which may be issued by the corporation is five hundred, all to be stock without par value.

The shares of stock shall be issued at One Hundred Dollars (\$100) per share, and may be acquired and held by such persons, firms or corporation, or groups thereof, only as shall execute agreements with the corporation appointing the corporation either one of their representatives for the promotion of their interests in, or one of their agents for the export sale of their goods, wares, or merchandise, to, or into, the country or countries in which the corporation may be conducting export trade. No persons, firm or corporation shall be entitled to hold more than one share of stock without par value, nor may such stock be issued to any person, firm or corporation not a member of the National Association of Manufacturers of the United States of America, nor shall any such stockholder be entitled to subscribe for, purchase, receive or hold any part of any new or additional issue of stock. The corporation, after providing for its necessary and reasonable expenses of operation and maintenance, shall have power, by a vote of two-thirds of the members of its Board of Directors, to

make such appropriations out of its surplus funds for the development of export trade or ratably to the membership of the corporation as and when its Board of Directors shall so order.

The common stock may be increased according to law.

The holder of each share of the common stock shall be entitled at any meeting of stockholders of the corporation to one vote in person or by proxy.

Fourth: The amount of capital with which the corporation will carry on business is Twenty Five Hundred Dollars.

Fifth: The principal business office of the corporation is to be located in the Borough of Manhattan, City, County and State of New York.

Sixth: The duration of the corporation is to be perpetual.

Seventh: The number of its directors is to be fifteen, and it is hereby provided, pursuant to law, that the directors are not required to be stockholders, of which, five directors shall be elected in each year and the term of office of each director, except as provided in the next section hereof, shall be three years, or until his successor shall be chosen.

Eighth: The names and postoffice addresses of the directors for the first year and the term of office of each are as follows:

To serve until the first annual meeting.

To serve until the second annual meeting.

To serve until the third annual meeting.

Ninth: The names and postoffice addresses of the subscribers to this certificate and the number of shares of stock which each agrees to take in the corporation are as follows:

Tenth: The Board of Directors may appoint an Executive Committee from among their number, which committee to the extent provided in the by-laws of the corporation shall have and may exercise all the powers of the Board of Directors in the management of the business and affairs of the corporation during the intervals between the meetings of the Board of Directors as far as may be permitted by law.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate this fifth day of April, 1919.

EXHIBIT XVIII.

PROPOSED AGREEMENT OF A CEMENT EXPORT ASSOCIATION.¹

Memorandum of agreement made this day of, 19...., by and between Portland Cement Export Corporation, a corporation of the State of New York (hereinafter, for convenience, called the "export company"), of the first part, and Portland Cement Co., a corporation of the State of (hereinafter, for convenience, called the "cement company"), of the second part.

Whereas, the export company has been incorporated for the purpose, among other things, of furthering the interests of the cement manufacturers, stockholders thereof, by providing an instrumentality to make effective the united effort of the stockholders in creating and developing markets in foreign countries for cement of their manufacture, and the successful carrying out of the plans contemplated requires the execution of agreements between the export company and the several cement companies stockholders thereof embodying the terms and conditions hereinafter set forth.

Now, therefore, this agreement witnesseth, that in consideration of the premises and the sum of \$1 to the cement company by the export company in hand paid, the receipt whereof is hereby acknowledged, and the covenants and agreements hereinafter contained, the parties hereto have agreed, and by these presents do agree, as follows, to wit:

The cement company shall sell and deliver to the export company, either from a plant of the cement company or from another company, and the export company shall purchase and pay for cement as follows:

1. *Quality*.—All cement delivered by the cement company

¹Hearings before the Committee on Interstate Commerce, U. S. Senate, 64th Congress, 2nd session, on H. R. 17350, pp. 131-3.

hereunder shall be guaranteed by the manufacturing cement company to comply with and pass (a) the specifications of the American Society of Testing Materials and (b) all other local specifications of the countries to which the cement is to be shipped by the export company, provided that said local specifications are such that it is reasonably possible for the cement company to manufacture cement complying with and passing such local specifications at a mill or plant operated by it, and (c) whenever required by the export company the cement is to be tested by the laboratory of the Bureau of Standards, Washington, D. C., or other recognized public testing laboratory at the cost of the export company.

2. *Packages.*—The cement company shall pack the cement in the kind of packages and ways designated from time to time by the export company.

3. *Markings.*—Said packages shall only bear such marks, labels and indicia as shall be directed from time to time by the export company. Until the export company shall direct otherwise, each package shall be marked only with (a) the brand of the export company, a specimen of which is appended hereto, and (b) the number to identify the manufacturing cement company.

4. *Quantity.*—The cement company shall furnish and deliver hereunder each year, as the export company may order, an amount of cement not exceeding 5 per cent. (5%) of its annual capacity as set forth in the table hereinafter in this paragraph contained, said capacities to govern until revised by agreement of the cement company and the export company, provided that the cement company may furnish and deliver, upon orders of the export company, any amount of cement in excess of the foregoing as may suit its convenience. The foregoing is subject to contingencies arising from fires, strikes and other causes beyond the control of the cement company, and in the event of such disability both the export company and the cement company shall be relieved from the obligation of ordering, furnishing and delivering cement from or by the company so affected so long as such disability continues.

Table of Capacities.

	Barrels
Allentown Portland Cement Co.	900,000
Coplay Portland Cement Co.	1,700,000
Dexter Portland Cement Co.	900,000
Edison Portland Cement Co.	1,800,000
Giant Portland Cement Co.	1,000,000
Glens Falls Portland Cement Co.	650,000
Lawrence Portland Cement Co.	1,500,000
Helderberg Portland Cement Co.	550,000
Nazareth Portland Cement Co.	1,250,000
Penn-Allen Portland Cement Co.	650,000
Pennsylvania Portland Cement Co.	1,100,000
Total	12,000,000

Within the limit aforesaid, the quantity to be sold and delivered by the cement company shall be that proportion of the total amount of cement sold by the export company which the number of shares of the capital stock of the export company held by the cement company and its officers bears to the total number of shares of said capital stock issued and outstanding, it being understood and agreed that the export company shall distribute its orders from time to time in accordance with the foregoing so as to keep the quantity to be sold and delivered by the cement company as accurately as practicable in proportion to the number of shares held by it and its officers in the export company.

5. *Deliveries.*—

(a) All orders from the export company to the stockholding cement companies shall be distributed among them as nearly as practicable in accordance with the proportion above indicated, so that no material benefit or disadvantage may accrue to any of the stockholders, subject only to such departures from a strict application thereof as may be reasonably necessary to further the business of the export company, and a copy of each order

placed with each stockholding company shall be sent to each and every other stockholding cement company to the end that each cement company may have a record to insure a proper observance of this rule.

(b) The cement company shall furnish all cement ordered by the export company hereunder to points of export within the United States, freight charges prepaid or collect, as directed by the export company, and shall make all shipments as promptly as possible and whenever possible shall give preference to orders of the export company.

(c) The export company shall be responsible for the cement after it has been loaded on cars at the cement company's plant and proper bill of lading therefor secured from the railroad company, and all loss that may occur thereafter shall be borne by the export company. But it is understood and agreed that the cement company shall take all actions necessary and proper to recover for loss of cement so shipped from carriers, being reimbursed by the export company for the cost occasioned thereby, or allow the export company to take such action in the name of the cement company and render all reasonable assistance in the prosecution thereof, in case such loss should occur while the cement is regarded by the carrier as cement of the cement company.

(d) The cement company shall not be required to make shipments of less than a minimum carload, and the export company shall be responsible for all lighterage, unloading, loading, brokerage and other charges after the cement has left the plant of the cement company.

6. *Prices.*—The selling price of the cement per barrel to the export company by the cement company shall be fixed from time to time by agreement between the export company and the cement company, and the price at any time at any point of delivery shall be the same to all cement companies holding stock in the export company.

7. *Payments.*—The export company shall pay for all cement shipped to it by the cement company hereunder in New York

exchange in not to exceed three months from the date of shipment by the cement company.

8. *Sacks*.—All sacks returned to the cement company shall be received and paid for by it on the same basis and subject to the same terms and conditions as apply at the time to sacks returned to the cement company by its domestic customers.

The cement company shall furnish the export company with any and all reading matter, cuts and the like, available for advertising purposes used by the cement company in its domestic advertising and available for use by the export company, but only as a loan; and any loss thereof shall be paid for by the export company. But it is understood and agreed that all advertising by the export company, whether by the use of such borrowed matter or otherwise, shall be undertaken and paid for by the export company and shall be of a character to promote the interests of all the stockholding companies equally.

In witness whereof, the parties hereto have caused these presents to be executed by their duly authorized officers and their corporate seals to be hereto affixed the day and year first above written.

EXHIBIT XIX.

INTERNATIONAL TOBACCO AGREEMENT NO. 1.¹

*Agreement of the American Tobacco Company Interests and the
Imperial Tobacco Company, Limited, Relative to the
Limitation of the Sphere of the Operation of
Each, and the Transfer of Ogden's
Limited.*

An agreement made the twenty-seventh day of September, one thousand nine hundred and two, between Ogden's Limited, being a company duly incorporated under English law (hereinafter referred to as the "Ogden Company"), of the first part; The

¹Report of the Commissioner of Corporations on the Tobacco Industry (1909), Pt. 1, pp. 431, 435-9.

American Tobacco Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, one of the States of the United States of America (hereinafter referred to as the "American Company"), of the second part; Continental Tobacco Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey (hereinafter referred to as the "Continental Company"), of the third part; American Cigar Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey (hereinafter referred to as the "Cigar Company"), of the fourth part; Consolidated Tobacco Company, a corporation organized and existing under and by virtue of the said laws of the said State of New Jersey (hereinafter referred to as the "Consolidated Company"), of the fifth part; British Tobacco Company, Limited, being a company incorporated under English law (hereinafter referred to as the "British Company"), of the sixth part; and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, a corporation incorporated under English law (hereinafter referred to as the "Imperial Company"), of the seventh part.

14. Each of the parties hereto of the first six parts for itself and not the one for any others agrees and shall covenant with the Imperial Company that the covenanting party will not at any time after the transfer day, except as hereinafter expressly excepted, either solely or jointly with any other person or persons company or companies, directly or indirectly carry on or be employed, engaged or concerned, or interested in the business in the United Kingdom of a tobacco manufacturer, or in any dealing in tobacco or its products therein, or sanction the use of its name in connection with any such business therein, save so far as the covenanting company, shall, as a member of the Imperial Company or as a member of any company manufacturing cigars in the United States or of any other companies formed or to be formed with the concurrence of the Imperial Company, be interested in the business thereof, or through, or in connection with the Imperial Company, as hereinafter provided. The said covenanting parties will procure the following directors or some or one of

them, namely, James Buchanan Duke, Benjamin Newton Duke, Thomas Fortune Ryan, John Blackwell Cobb, Williamson Whitehead Fuller, William Rees Harris, Percival Smith Hill and Caleb Cushing Dula, and will, respectively, use their best endeavors to procure such other directors as shall be required by the Imperial Company to enter into a covenant with the Imperial Company similar to that referred to in the preceding part of this clause.

15. The Imperial Company similarly agrees and shall covenant with the American Company, the Continental Company, the Cigar Company and the Consolidated Company, that the Imperial Company will not at any time after the transfer day, except as hereinafter expressly excepted, either solely or jointly, with any other person or persons, company or companies, directly or indirectly, carry on or be employed, engaged, concerned or interested in the business in the United States of a tobacco manufacturer or in any dealing in tobacco or its products therein, or sanction the use of its name in connection with any such business therein save as far as the Imperial Company shall, as a member of any other company formed or to be formed with the concurrence of the American Company, the Continental Company, the Cigar Company, or the Consolidated Company, be interested in the business thereof, and save and except that the Imperial Company shall be at liberty to buy and treat tobacco leaf and other materials in the United States for the purpose of its business, and save and except such business as shall be carried on through or in connection with the American Company, the Continental Company, the Cigar Company or the Consolidated Company as hereinafter provided, the Imperial Company will procure the following of its directors, viz., Sir William Henry Wills, Henry Overton Wills, Sir Edward Payson Wills, Sir Frederick Wills, George Alfred Wills, Henry Herbert Wills, Walter Melville Wills, Charles Edward Lambert, John Dane Player, Walter Butler, William Goodacre Player and William Ruddell Clarke, and will use its best endeavors to procure such other of its directors as shall be required by the American Company, the Continental Company, the Cigar Company and the Consolidated Company to enter into a

covenant similar to that referred to in the preceding part of this clause.

16. Forthwith, or as soon as may be after the transfer day, the Imperial Company shall duly appoint to its board three (3) directors, nominated by the Ogden Company, subject to their acquiring the necessary qualifications, and the directors so appointed shall be re-elected at the next ordinary general meeting and shall be classified so that only a due proportion of them shall retire in each year.

17. The export business of the Ogden Company hereinbefore excluded from the operation of this contract is to be the subject of an agreement entered into contemporaneously with this agreement, and providing for the transfer to a separate company of the export business from the United Kingdom (except to the United States) not only of the Ogdens Company, but also of the Imperial Company and of Salmon & Gluckstein, Limited, and the export business from the United States of the American Company, the Continental Company and the Cigar Company (except to the United Kingdom), which agreement has been already prepared and is executed contemporaneously with this agreement. For the purpose of construing this agreement the export business of the said several companies shall be deemed to be herein defined in the same manner as in the said contemporaneous agreement, The "United Kingdom" and the "United States" are also, respectively, to be deemed to be defined as defined in the same agreement.

18. From and after the date of transfer, subject to agreements already existing between the Imperial Company and its present agents, neither the Imperial Company nor Salmon & Gluckstein, Limited, shall sell or consign any tobacco products to any person, firm or company within the United States except the American Company, or persons or companies designated by it, and on the other hand the American Company, the Continental Company and the Cigar Company, and the Consolidated Company, respectively, shall not sell or consign any tobacco products to any person, firm or company in the United Kingdom except the Imperial Company, or any persons or companies desig-

nated by it, the intention being that the American Company or its nominees shall be the sole customer of the Imperial Company and of Salmon & Gluckstein, Limited, in the United States, and that the Imperial Company or its nominees shall be the sole customer of the American Company, the Continental Company, and the Cigar Company in the United Kingdom. None of the parties shall sell any tobacco products to any person, firm or company whom they have reason to believe will export the same to the territory in which the seller has agreed not to sell such goods as herein provided.

19. For American goods sold to the Imperial Company or its nominees for sale in the United Kingdom in pursuance of the preceding clause the Imperial Company shall pay the cost of manufacture and packing of such goods (but not including any expenses of advertising and selling) plus ten per cent. (10%), and shall also pay freights, customs charges and duties and for goods of the Imperial Company and of Salmon & Gluckstein, Limited, sold by them to the American Company, the Continental Company or the Cigar Company, for sale within the United States, the American Company, the Continental Company or the Cigar Company, as the case may be, shall pay the cost of the manufacture and packing thereof (but not including any expenses of advertising or selling), plus ten per cent. (10%), and shall also pay freights, customs charges and duties. In all cases of sales under this clause the invoices of the respective vendors shall be final and binding as to cost. The Imperial Company shall be empowered by the American Company and the Continental Company to manufacture their brands within the United Kingdom for sale therein, and the American Company, the Continental Company and the Cigar Company shall be empowered to manufacture the brands of the Imperial Company in the United States for sale therein, and each party shall manufacture the brands of the other party upon recipes and formulae to be supplied by the other.

20. As early as practicable and subject to existing contracts and obligations of the companies manufacturing and selling the cigars and cigarettes hereinafter referred to, the American Com-

pany, the Continental Company and the Cigar Company will appoint or procure the appointment of the Imperial Company sole agent for the sale within the United Kingdom of Havana and Porto Rico cigars and Havana and Porto Rico cigarettes directly or indirectly controlled by the American Company, the Continental Company and the Cigar Company, and such agency shall be upon the terms of the Imperial Company receiving a net commission of seven and one-half per cent. ($7\frac{1}{2}\%$) upon the Havana and Porto Rico prices, respectively, and being allowed three months' credit for payment of the invoice prices less such seven and one-half per cent. and the Havana and Porto Rico prices charged the Imperial Company, shall, from time to time and at all times, be as low as the prices charged by the American Company, the Continental Company and the Cigar Company, or parties controlled by them, for similar cigars and cigarettes sold to their most-favored customers, subject only to the exception that if at any time the prices of cigars or cigarettes sold to any country not affecting British trade shall be temporarily reduced for the purposes of competition, such local and temporary reduction is not to be taken into account for the purpose of fixing the price of cigars and cigarettes sold to the Imperial Company. If and so far as the control of any other cigar trade not hereinbefore provided for is now possessed or shall be acquired by the American Company, the Continental Company and the Cigar Company, or any of them, a similar agency is to be given to the Imperial Company in respect thereof. The Imperial Company shall not (except to complete any other contract already made) handle or sell any other Havana or Porto Rico cigars and cigarettes than those of the American Company, the Continental Company and the Cigar Company, for which the Imperial Company holds the aforesaid agency, and a similar provision shall apply to any other cigars or cigarettes for which the aforesaid agency may be hereafter granted, and the Imperial Company shall use its best efforts and endeavors to promote and enlarge the sales of all such cigars and cigarettes within the United Kingdom, and provided the Imperial Company maintains a sale of the Havana cigars or cigarettes included in the agency hereinbefore provided for equal to

not less than seventy-two per cent. (72%) of the total annual importations into the United Kingdom, duty paid, of cigars and cigarettes made in Cuba, the American Company, and the Cigar Company, and the Continental Company shall not be entitled to call in question the efforts and endeavors of the Imperial Company hereinbefore required: *Provided always*, That the percentage to be maintained by the Imperial Company shall be ascertained upon the average of three years. The Imperial Company shall sell the cigars and cigarettes from time to time falling within the said agency at prices not exceeding their cost to the Imperial Company with the addition of freights, railway charges, packages, customs duties and customs charges, and the said commission of seven and one-half per cent. The American Company, the Continental Company and the Cigar Company will not knowingly supply cigars or cigarettes to be trans-shipped or indirectly imported into the United Kingdom. The aforesaid proportion of 72 per cent. has been based upon the belief and assumption that the parties hereto of the second, third, fourth and fifth parts or some or one of them control or will shortly control not less than 80 per cent. of the aforesaid annual importation, and if it shall hereafter appear that the proportion thereof actually controlled by the said parties is less than 80 per cent. then in such case the said proportion of 72 per cent. shall be correspondingly reduced.

21. The Imperial Company shall cause Salmon & Gluckstein, Limited, and A. I. Jones & Company, Limited, and any other companies, firms or persons from time to time controlled by it (subject to the performance of any prior contracts), to purchase their cigars of any brands comprised in the said agency through the Imperial Company as agent under the last preceding clause.

22. The American Company, the Continental Company, the Cigar Company and the Consolidated Company, together with their directors, entering into the covenant aforesaid, are to give to the Imperial Company in the United Kingdom the full benefit of their good will and support, and on the other hand the Imperial Company, together with its directors, entering the covenant aforesaid, are to give to the American Company, the Continental Company and the Cigar Company in the United States,

the full benefit of their good will and support, and with a view to giving further effect to the intention of the parties as in this clause hereinbefore expressed the allottees of the said 1,500,000 ordinary shares of the Imperial Company are not to sell or transfer more than 10 per cent. of the said shares within the period of five (5) years from the date of their allotment, if and so long as the present directors of the Imperial Company or some of them, shall hold not less than 3,000,000 ordinary shares of the Imperial Company.

23. This agreement is to be construed and take effect as a contract made in England and in accordance with the law of England but to the intent that any of the parties may sue in its own country. The Imperial Company is always to have an agent for service in the United States, and each of them, the American Company, the Continental Company, the Cigar Company and the Consolidated Company, is always to have an agent for service in England, and service of any such agent of any notice, summons, order, judgment or other process or document in respect of this agreement, or any matter arising thereout, shall be deemed to be good service on the party appointing such agent, and as regards each of the said parties whilst and whenever there is no other agent the following shall be considered to be the agents of the respective parties duly appointed under this clause, namely: For the Imperial Company, Samuel Untermeyer, of New York City, American counsel; and for the American Company, the Continental Company, the Cigar Company and the Consolidated Company, Joseph Hood, 41 Castle street, Liverpool, solicitor. Notice of any appointment under this clause shall be from time to time given by the appointor to the other parties hereto. The mode of service sanctioned by this clause is not in any way to prejudice or preclude any mode of service which would be allowable if this clause were omitted.

24. So far as it is necessary for the purpose of making the issue of ordinary shares hereinbefore mentioned the Imperial Company shall forthwith take the necessary steps for increasing its capital by the creation of an adequate number of ordinary shares (half preferred and half deferred) which shall rank *pari*

passu with and shall be of the same respective classes and confer the same rights and privileges as the 5,000,000 preferred ordinary shares, and the 5,000,000 deferred ordinary shares forming part of the original capital of the Imperial Company.

In witness whereof, the said parties of the first, second, sixth and seventh parts have hereunto affixed their common seals, and the said parties of the third, fourth and fifth parts have executed this agreement under the hand of their respective presidents the day and year first above written.

EXHIBIT XX.

INTERNATIONAL TOBACCO AGREEMENT NO. 2.¹

Agreement Made Between the American Tobacco Company Interests and the Imperial Tobacco Company, Limited, Relative to the Control of Business by the British-American Tobacco Company, Limited.

An agreement made the twenty-seventh day of September, one thousand nine hundred and two, between The Imperial Tobacco Company (of Great Britain and Ireland), Limited, being an English company duly incorporated under English law (hereinafter referred to as the "Imperial Company"), of the first part; Ogden's Limited, also being a company incorporated under English law (hereinafter referred to as the "Ogden Company"), of the second part; The American Tobacco Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, one of the States of the United States of America (hereinafter referred to as the "American Company"), of the third part; Continental Tobacco Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey (hereinafter referred to as the "Continental Company"), of the fourth part; American Cigar Company, a corpora-

¹Report of the Commissioner of Corporations on the Tobacco Industry (1909), Pt. 1, pp. 440-446.

tion organized and existing under and by virtue of the laws of the said State of New Jersey (hereinafter referred to as the "Cigar Company"), of the fifth part; Consolidated Tobacco Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey (hereinafter referred to as the "Consolidated Company"), of the sixth part; and Williamson Whitehead Fuller and James Inskip, on behalf of a company intended to be formed under the companies' acts, 1862 to 1900, with the name of "British-American Tobacco Company, Limited" (hereinafter referred to as the "British-American Company"), of the seventh part.

Whereas, the parties hereto of the first five parts now respectively carry on business as tobacco manufacturers and other ancillary businesses, which comprise as to the parties hereto of the first and second parts, businesses carried on within the United Kingdom of Great Britain and Ireland and export businesses as hereinafter defined and as to the parties hereto of the third, fourth and fifth parts, businesses carried on within the United States of America, and export businesses as also hereinafter defined, and proposals have been made for amalgamating the said export businesses by transfer thereof to the British-American Company upon the terms and conditions hereinafter expressed.

Now therefore, it is hereby agreed as follows:

1. In this agreement the words "United Kingdom" mean Great Britain and Ireland and the Isle of Man.

The words "United States" mean the United States of America as now constituted—Cuba, Porto Rico, the Hawaiian Islands and the Philippine Islands.

The words "export business" mean the manufacture of and dealing in tobacco and its products in any country or place outside the United Kingdom and the United States and the manufacture of and dealing in tobacco and its products within the United Kingdom for export to any other country except the United States, and the manufacture of and dealing in tobacco and its products in the United States (except in Cuba, Porto Rico, the Hawaiian Islands and the Philippine Islands) for the purpose of export to any other country except the United Kingdom, and

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the manufacture and selling in the United Kingdom and the United States, respectively, of tobacco to be supplied to ships in port for the purpose of ships' stores.

2. The parties hereto of the first five parts shall sell and the British-American Company shall purchase the export businesses as hereinbefore defined of the parties of the first five parts, and the good will appertaining thereto, which shall include formulae and recipes of preparation, treatment and manufacture, as well as license to use patent rights, trade-marks, brands, licenses and other exclusive rights and privileges for the purpose of such export business, and shall also include all stock or shares in companies incorporated in countries foreign to the United Kingdom and the United States owned or held by the parties of the first six parts, including all shares of the American Company in George A. Jasmatzi Company (of Dresden), and all shares of the Imperial Company in W. D. & H. O. Wills (Australia), Limited, at the price of two million eight hundred and twenty thousand pounds (£2,820,000), of which two equal third parts, or one million eight hundred and eighty thousand pounds (£1,880,000), shall be payable to the Ogden Company, the American Company, the Continental Company, the Cigar Company and the Consolidated Company, or some of them, in such proportions as they shall mutually agree and as shall be indicated in writing under the hands of their respective presidents or chairmen, as the case may be, and one-third, or nine hundred and forty thousand pounds (£940,000), shall be payable to the Imperial Company, and the said prices shall be satisfied by the allotment to the parties entitled thereto of fully paid-up ordinary shares in the British-American Company to be treated as of par value. The said sale and purchase shall take effect as to the Ogden Company on the 30th September, 1902 (hereinafter referred to as "the Ogden transfer day"), and as to the parties hereto of the first, third, fourth, fifth and sixth parts on the 31st October 1902 (hereinafter referred to as "the Imperial and American transfer day").

3. In addition to the ordinary shares by the preceding paragraph agreed to be allotted in payment of the said purchase money, the Imperial Company shall take and pay cash for three

hundred thousand (300,000) additional, one-pound ordinary shares, and the American Company, the Continental Company, the Cigar Company and the Consolidated Company, or some or one of them, shall take and pay cash for six hundred thousand (600,000) additional one-pound ordinary shares in the British-American Company, Limited, and such shares shall be allotted to such parties at once.

4. The Imperial Company and the Ogden Company will, respectively, sell to the British-American Company their several lands, buildings and hereditaments used as export factories, and the plant and equipment and stock in trade at the date of transfer forming a part of the said export businesses or undertakings, and the American Company, the Continental Company and the Cigar Company will sell to the British-American Company factories for export business and the plant and equipment and stock in trade at the date of transfer forming a part of the said export businesses or undertakings. The factories of the said respective parties employed for export purposes shall, in the case of the Imperial Company, include the export factory of the Imperial Company formerly belonging to W. D. & H. O. Wills, Limited, at Ashton Gate, Bristol, and the land and cottages held therewith; the leasehold export factory formerly belonging to Messrs. Lambert & Butler, Limited, in London; and the two export factories formerly belonging to the Richmond Cavendish Company, Limited, at Liverpool; and the cigarette factory of the Imperial Company formerly belonging to W. D. & H. O. Wills, Limited, at Sydney, in the Commonwealth of Australia. The export factories of the Ogden Company will include the bonded or export factory of the Ogden Company in Cornwallis street, Liverpool, and a factory at Sydney aforesaid. The export factories of the American Company, the Continental Company and the Cigar Company will include such suitable factories as shall be designated by these companies, or some or one of them, so that the price thereof with their plant and equipment as hereinafter fixed shall not exceed the aggregate price of the factories, land and cottages with their plant and equipment to be sold by the Imperial Company as before stated. All the said factories and the

plant and equipment used in connection with the same are to be taken at the value now standing in the books of the respective vendors thereof, and the stock in trade and materials hereby agreed to be sold are to be taken at cost. The respective values shall be paid by the British-American Company to the respective vendors in cash. As part of the export business and good will to be sold by the Imperial Company to the British-American Company the export business of Salmon & Gluckstein, Limited, shall be included, and the Imperial Company hereby undertakes to procure the transfer of the same to the British-American Company, but this shall not be deemed to include any lands, buildings or hereditaments. The said export business shall also include all the interest of the Imperial Company in a factory at Shanghai recently purchased by it and or in the American Cigarette Company of Shanghai.

5. The British-American Company shall be entitled to purchase at not exceeding cost thereof to its vendor any export business hereafter acquired by any of the parties hereto of the first six parts, as well as any shares in any companies incorporated in countries foreign to the United Kingdom and the United States acquired by any of said parties, and the export business and the assets employed in such business of any company the control of which shall be hereafter acquired by any of said parties, as well as any shares in companies engaged in export business which may be held by such controlled companies acquired by any of the parties of the first six parts as aforesaid.

6. The British-American Company shall have the right to use in its export business, as hereinbefore defined, any brands and trademarks now owned or hereafter acquired or adopted by any of the parties hereto of the first six parts.

7. The sale and purchase of the said export businesses hereinbefore agreed to be made are subject to and with the benefit of all contracts heretofore made by the respective parties hereto of the first six parts, with their agents or other persons interested in the said businesses so far as such contracts are now in force, save and except that if the Imperial Company is under an obligation to buy the shares of G. F. Todman in W. D. & H. O.

Wills (Australia), Limited, at any price not approved by the British-American Company, such obligation is not agreed to be undertaken by that company. The Japanese stockholders in Murai Bros. Company, Limited, shall have the right to take from the British-American Company on or before January 1, 1904, by paying par therefor, with interest thereon at the rate of six per cent. per annum (less any dividends received) from the date of their purchase by the American Company until payment, all issued stock sold by the American Company to the British-American Company in excess of sixty per cent. of the total capital stock of Murai Bros. Company, Limited.

8. The dividends or proportion of dividends upon shares hereby agreed to be sold and the profits of each export business hereby agreed to be sold shall, up to the respective transfer days, belong to the respective vendors of the same.

9. The parties of the first five parts, shall, respectively, clear the lands, buildings and hereditaments hereby agreed to be sold of all mortgages, charges and other incumbrances, and shall be entitled to the proceeds of all book debts due to the said parties, respectively, on the respective transfer days, but for a period of three calendar months thereafter the British-American Company shall be authorized on behalf of these respective parties to collect and receive such book debts, and the proceeds shall be from time to time paid over to the parties entitled thereto at the end of every month.

10. The British-American Company shall undertake the observance and performance of all covenants and conditions on the part of the lessee or tenant in any lease of or agreement relating to the lands, buildings and hereditaments hereby agreed to be sold, and thenceforth on the part of the lessee or tenant to be observed and performed, and the British-American Company shall also, as from the same date, undertake the performance of all contracts bona fide entered into by the parties of the first five parts in the ordinary course of carrying on their export business and particularly applicable thereto, and shall indemnify the parties of the first five parts against all proceedings, claims and demands in respect thereof.

11. All books of account of the parties of the first and second parts referring solely to the export businesses hereby agreed to be sold, and all books of reference to customers and other books and documents of the said parties relating solely to the said export businesses (except the statutory and minute books, and any other books of a private nature) shall be delivered to the British-American Company upon completion of the purchase, and the British-American Company shall thenceforth be entitled to the custody thereof and to the use thereof for the purpose of carrying on its business, but, nevertheless, the parties of the first and second parts shall have free access at all reasonable times to the said books and documents, or any of them, for any reasonable purpose, and to the temporary use of the same for the purpose of any legal proceedings. The parties of the third, fourth and fifth parts shall deliver to the British-American Company a list of their respective customers for the export businesses hereby sold and any books used exclusively in connection with such business.

12. The British-American Company shall from the time of any property being at its risk be entitled to the benefit of all current insurances, and the parties of the first five parts shall be entitled to repayment of a proportionate part of the premiums already paid for the unexpired portion of the current year of any policy, and all periodical payments shall be apportioned as from the respective transfer days hereinbefore mentioned.

13. The purchases shall be completed on or before the 1st day of January, 1903, in London, and the consideration for the same shall be paid or satisfied subject to the provisions of this agreement and thereupon and from time to time the parties of the first five parts shall execute and do all such assurances and things for vesting the said premises in the British-American Company and giving to it the full benefit of this agreement as shall be reasonably required.

14. As regards any of the premises subject to mortgages which can not be paid off until after the time of completion, the parties of the first five parts shall, if so desired by the British-American Company, convey the said premises subject to the

mortgages affecting the same, respectively, and the British-American Company shall retain out of the consideration aforesaid a sum sufficient to pay off and satisfy the claims under such mortgage.

15. In any and every case where any leaseholds hereby agreed to be sold, are only assignable with the consent of the landlords from whom the same respectively are held, the parties of the first five parts, or such of them as hold such leaseholds, shall use their best endeavors to obtain the requisite consent for the assignment to the British-American Company, and in any case where such consent can not be conveniently obtained the parties of the first five parts or such of them as hold such leaseholds as aforesaid, shall execute a declaration of trust in favor of the British-American Company, or otherwise deal with the same as the British-American Company shall direct.

16. The possession of the property hereby agreed to be sold by the Ogden Company shall be delivered to the British-American Company on the Ogden transfer day, and the possession of the properties hereby agreed to be sold by the parties hereto of the first, third, fourth and fifth parts shall, subject as hereinafter mentioned, be delivered to the British-American Company on the Imperial and American transfer day, but if the said parties of the third, fourth and fifth parts shall not be able to deliver possession on the last-mentioned transfer day, the said parties shall from such day until delivery of possession carry on and conduct their export business for the benefit of the British-American Company, and shall account to that company for all the profits arising therefrom, but the British-American Company shall pay interest at the rate of five per cent. per annum on the purchase money from the transfer day until actual payment.

17. For the purposes of title of the lands, buildings and hereditaments hereby agreed to be sold by the parties of the first and second parts, they shall, respectively, be deemed and taken to have entered into this contract with the British-American Company subject to the terms and stipulations of the Liverpool public sale conditions so far as the same shall be applicable to a sale by private treaty.

18. Each of the parties hereto of the first six parts hereby agrees and shall covenant with the British-American Company that the said covenanting party will not at any time after its transfer day, either solely or jointly with any other person, company or firm, directly or indirectly, carry on or be employed, engaged or concerned or interested in export business as defined in this agreement, except as it may be interested as a member of the British-American Company or of a company formed or to be formed with the concurrence of the British-American Company, and also except so far as the parties of the third, fourth, fifth and sixth parts may be interested as members of companies or firms engaged in exporting cigars and cigarettes from Cuba, Porto Rico, the Hawaiian Islands and or the Philippine Islands, and the British-American Company hereby agrees and shall covenant with each of the parties hereto of the first six parts that the British-American Company will not at any time hereafter, either solely or jointly with any other person, firm or company, directly or indirectly, carry on or be employed, engaged, concerned or interested in the business of a tobacco manufacturer or in any dealing in tobacco or its products except in the manner and within the limits contemplated and authorized by this agreement.

19. The British-American Company will, if and so long as thereunto required by the Imperial Company, manufacture in the United Kingdom such brands as the Imperial Company shall require for sale in the United Kingdom and for export to the United States, to be manufactured in bond, and the Imperial Company shall pay for tobacco manufactured pursuant to this clause the cost of manufacturing and packing, with an addition of 10 per cent. upon such cost, and the Imperial Company shall also pay the duty.

20. This agreement is to be construed and take effect as a contract made in England and in accordance with the law of England; but to the intent that any of the parties may sue in its own country, the Imperial Company is always to have an agent for service in the United States, and each of them, the American Company, the Continental Company, the Cigar Company and the Consolidated Company, is always to have an agent for service

in England, and service on any such agent of any notice, summons, order, judgment or other process or document in respect of this agreement, or any matter arising thereout, shall be deemed to be good service on the party appointing such agent; and as regards each of the said parties whilst and whenever there is no other agent the following shall be considered to be the agents of the respective parties duly appointed under this clause, namely: For the Imperial Company, Samuel Untermyer, of New York City, American counsel, and for the American Company, the Continental Company, the Cigar Company and the Consolidated Company, Joseph Hood, 41 Castle street, Liverpool, solicitor. Notice of any appointment under this clause shall be from time to time given by the appointer to the other parties hereto. The mode of service sanctioned by this clause is not in any way to prejudice or preclude any mode of service which would be allowable if this clause were omitted.

21. The validity of this agreement is not to be impeached on the ground that the vendors, as promoters or otherwise, stand in a fiduciary relationship to the British-American Company, and that the directors thereof being interested in the vendors' businesses do not constitute an independent board. Upon the adoption hereof by the British-American Company in such a manner as to render the same binding on that company in favor of the vendors, the said Williamson Whitehead Fuller and James Inskip shall be discharged from all liability hereunder.

22. The cost of and incidental to the formation and registration of the British-American Company shall be borne by that company.

IN WITNESS WHEREOF, the said parties of the first, second and third parts have hereunto affixed their common seals, and the said parties of the fourth, fifth and sixth parts have executed this agreement under the hand of their respective presidents, and the parties of the seventh part have hereunto subscribed their names the day and year first before written.

EXHIBIT XXI.

INTERNATIONAL POWDER AGREEMENT.¹

Agreement made this 26th day of October, 1897, between: Messrs. E. I. duPont de Nemours & Co., of Wilmington, Del.; Laffin & Rand Powder Company, of New York City; Eastern Dynamite Company, of Wilmington, Del.; The Miami Powder Company, of Xenia, Ohio; The American Powder Mills, of Boston, Mass.; The Aetna Powder Company, of Chicago, Ill.; The Austin Powder Company, of Cleveland, Ohio; The California Powder Works, of San Francisco, Cal.; The Giant Powder Company, Consolidated, of San Francisco, Cal.; The Judson Dynamite and Powder Company, of San Francisco, Cal. (hereinafter collectively referred to as "the American Factories"), of the one part, and The Vereinigte Koln-Rottweiler Pulverfabriken, of Cologne; The Nobel-Dynamite Trust Company, Limited, of London (hereinafter collectively referred to as "the European Factories"), of the other part.

Whereas, the parties hereto own or control a large number of companies and works engaged in the manufacture and trade of explosives, and whereas, it has been deemed advisable to make arrangements, so as to avoid anything being done which would affect injuriously the common interest.

It has therefore been agreed as follows:

1. The word "Explosives" in this agreement is to be understood as including detonators, black powder, smokeless sporting powder, smokeless military powder and high explosives of all kinds.

2. A list of all the companies and factories controlled by the American Factories directly or indirectly is to be prepared and handed by Messrs. E. I. duPont de Nemours & Co., in duplicate to the European Factories at the time of the execution

¹The United States of America v. E. I. duPont de Nemours and Company, etc., in the Circuit Court of the United States, for the District of Delaware, No. 280. In equity. Records and briefs. Government's Exhibits, Vol. 2, No. 119, pp. 1123-1132.

of this agreement, and the European Factories are to hand to Messrs. E. I. duPont de Nemours & Co. a complete list of the companies controlled by them directly or indirectly when executing this agreement. Should the period of control which any of the parties have over any company or factory be fixed by contract for a shorter time than the duration of this present agreement, that fact shall be stated on such list, and it is understood that in the event of any renewal of such arrangement in such a manner as to extend the control over the period of the present agreement, the companies in question shall be bound to adhere to the terms hereof.

The American Factories and the European Factories shall both be bound to stipulate adherence to the present agreement on the part of all and any companies or factories over which they now have control or may directly or indirectly obtain control during the continuance of this agreement.

3. Regarding detonators it is agreed that the European Factories shall abstain from erecting detonator works in the United States of North America. The works which are building at Jamesburg, New Jersey, are not to be completed, and the whole scheme as worked out by Mr. Muller is to be abandoned. In consideration of this scheme being abandoned and the erection of the works being stopped, the American Factories undertake to bear all expenses hitherto incurred in connection therewith, and they will, moreover, discharge the obligations which Mr. Muller has undertaken in connection with the above-mentioned scheme, with regard to which obligations a special subsidiary agreement is to be made. And it is moreover agreed that the American Factories shall order and take from the European Factories, i. e., from the Rhenish Westphalian Sprengstoff A. G. every year 5,000,000 detonators at the following prices, viz.: M. 11 for No. 3, M. 12 for No. 3 rim, M. 13 for No. 4, M. 15.50 for No. 5, M. 16.50 for No. 5 rim, M. 20 for No. 6 and M. 21 for No. 6 rim, all these prices to be understood per 1,000 ex ship New York without duty.

4. As regards black powder the American Factories bind themselves not to erect factories in Europe, and the European

Factories bind themselves not to erect factories in the United States of America. Both parties, however, are to be free to import into the other party's territory.

5. As regards smokeless sporting powder the American Factories undertake not to erect factories in Europe, and the European Factories undertake not to erect factories in the United States of America. Both parties, however, are to be free to import into the other party's territory.

6. With regard to smokeless military powder it is hereby agreed that the European Factories undertake not to erect any factory in the United States of America, and that the American Factories undertake not to erect any factories in Europe.

Whenever the American Factories receive an inquiry from any government other than their own, either directly or indirectly, they are to communicate with the European Factories through the chairman appointed, as hereinafter set forth, and by that means to ascertain the price at which the European Factories are quoting or have fixed, and they shall be bound not to quote or sell at any lower figure than the price at which the European Factories are quoting or have fixed. Should the European Factories receive an enquiry from the Government of the United States of North America, or decide to quote for delivery for that government, either directly or indirectly, they shall first in the like manner ascertain the price quoted or fixed by the American Factories and shall be bound not to quote or sell below that figure.

7. With regard to high explosives (by which all explosives fired by means of detonators are to be understood), it is agreed that the United States of North America, with their present or future territories, possessions, colonies or dependencies, the republics of Mexico, Guatemala, Honduras, Nicaragua and Costa Rica, as well as the republics of the United States of Columbia and Venezuela, are to be deemed the exclusive territory of the American Factories, and are hereafter referred to as "American Territory." All the countries in South America not above mentioned, as well as British Honduras and the Islands in the Caribbean Sea, which are not Spanish possessions, are to be deemed

common territory, hereinafter referred to as "Syndicated Territory;" the rest of the world is to be exclusive territory of the European Factories, hereinafter referred to as "European Territory." The Dominion of Canada and the Islands appertaining thereto, as well as the Spanish possessions in the Caribbean Sea, are to be a free market unaffected by this agreement.

8. The American Factories are to abstain from manufacturing, selling or quoting, directly or indirectly, in or for consumption in any of the countries of the European Territory, and the Europeans are to abstain in like manner from manufacturing, selling or quoting, directly or indirectly, in or for consumption in any of the countries of the American Territory. With regard to the Syndicated Territory neither party is to erect works there, except by a mutual understanding, and the trade there is to be carried on for joint account in the manner hereinafter defined.

9. The American Factories shall forthwith designate in writing a chairman and vice-chairman, who shall hold office as such until their respective successors shall be appointed by the party of the first part, and such chairman, or in his absence such vice-chairman, shall be the authorized representative of the American Factories, to whom and through whom all communications, acts and transactions in respect of this agreement, unless otherwise stipulated, shall be had; and the European Factories shall likewise forthwith designate in writing a chairman and vice-chairman, to whom shall be referred all matters which by terms of this contract are made referable to the chairman representing the European Factories. The said chairman or vice-chairman shall jointly establish rules for the carrying out of the Syndicate arrangements hereinafter referred to.

10. The chairmen shall from time to time mutually agree upon a basis price for each market in the Syndicated Territory, such basis price to include cost of manufacture, freight, insurance, landing charges, magazine charges and all other charges until delivery, including agency commission and the contribution toward the common fund hereinafter stipulated.

The chairmen shall likewise fix a selling price for each market, which is to be deemed a convention price, below which no

sales are to be effected and the difference between the basis price and the selling price is to be deemed the Syndicate profit, and to be divided in equal shares between the American Factories and the European Factories.

Losses due to bad debts are to be borne by the parties effecting the sale.

11. A common Syndicate Fund is to be constituted by a payment of \$1 per case of 75 per cent. dynamite, or per case of gelignite, gelatine dynamite or blasting gelatine, and a payment of such portion of \$1 as the percentage of nitro-glycerine in lower grade dynamites bears to 75 per cent. until such fund reaches the amount of \$50,000, when the contribution is to be reduced to one-half the above-mentioned rates.

12. The Syndicate accounts, according to Clause 10, made up to 31st December in each calendar year are to be handed in by both parties so as to reach the chairman of the other party by the 15th March next ensuing, and the payments for the balance are to be made by the 30th June following, when the amount to be contributed to the common fund shall likewise be paid.

[In regard to Clause 12 of the agreement, I have no objections at all to the extension of time whereat the accounts are to reach both parties, namely, to April 15th of each year, instead of March 15th, as per Clause 12.—Letter, April 11. 1899.]

The common fund shall, as the chairmen may decide, be invested in government securities, and it is from this fund that any fine or fines hereinafter stipulated, not recovered from the parties, shall be taken. It shall likewise be admissible for the chairmen to dispose of two-thirds of the common fund for the purpose of protecting the common interest against outside competition.

13. Any breach of this agreement shall be adjudicated upon by the chairmen, and if they can not agree they shall appoint an umpire. For the guidance of the chairmen and umpire it is agreed that, should either of the parties erect factories in a country reserved to the other, the liquidated damages shall not be fixed lower than £10,000.

Should either party trade in the territory of the other it shall be admissible for the chairmen to absolve them of any accidental

breach, but if an intentional breach shall be proved, the fine shall be the invoice value of the goods supplied. No restriction is placed on the decision of the chairmen as to the penalty to be imposed for intentional underselling in one of the markets of the Syndicate Territory.

14. It is intended that in the Syndicate markets the arrangement should resemble, as far as possible, the convention arrangements hitherto had by the Europeans, where the agents meet from time to time, and come to decisions within the limits of powers given to them, or where they meet in order to make recommendations to their principals.

15. The chairmen both agreeing have full powers to vary the Syndicate arrangements as they may deem expedient from time to time in order to meet outside competition and to regulate business for the best in the interest of the parties concerned, and they shall likewise have the power under exceptional circumstances of authorizing sales in the prohibited territories.

16. With regard to the markets in the European territory in which the American Factories have already done business, and from which, in accordance with the stipulations of this agreement, they are to retire, as well as the markets of the American territory in which the European Factories have already done business, and from which they are, according to the stipulations of this agreement, to retire, the following is agreed:

Agents are as far as possible to be retained by the party who is henceforward to do the business in the market in question.

Magazines are in a like manner to be taken over at their present value, to be determined by mutual agreement or arbitration.

Stocks, if in good merchantable condition, are to be taken over at full cost, i. e., the amount which the goods at present cost with accumulated charges.

17. Nothing herein contained shall be construed to prevent either of the parties hereto from carrying out any contracts for the sale of their products which have been entered into in good faith prior to the 15th of July, 1897. Contracts made after the said date shall be transferred to the party by whom the business shall henceforth be done in the market in question.

18. This agreement is to be in force for 10 years, beginning from the 15th of July, 1897, subject to written notice being given six months prior to the 15th of July, 1907. In the absence of notice this agreement is to continue thereafter from year to year until such six months' notice of intended termination is given.

19. Should any difference or dispute arise between the parties hereto, touching this agreement, or any clause, matter or thing relating thereto, or as to the rights, duties or liabilities of any of the parties hereto, the same shall be referred to the chairmen, who shall arbitrate thereon, and their award shall be final. Should they not agree they shall appoint an umpire whose award shall be final. In all cases in which the chairmen disagreeing select an umpire, the following provisions shall apply:

If the question or matter to be decided is brought forward by one of the parties of the first part, the umpire shall be a European. If on the contrary, the question or matter to be decided is brought forward by one of the parties of the second part, the umpire shall be an American.

20. With regard to patents which the American Factories or the European Factories may possess in each others' territories, it is understood that unless compelled by agreement with inventors to take legal proceedings with regard to alleged infringements, no legal proceedings are to be taken in respect of any alleged infringement until an attempt has been made to settle the matter amicably. In order to bring about such amicable understanding the question is first to be ventilated by correspondence between the chairmen, who shall have power to constitute themselves an arbitral tribunal, obtaining evidence from experts on both sides; and should they hold that an infringement has been committed, they shall fix the rate of royalty to be paid. Should they not agree, they shall call on the parties to sign a deed of submission, authorizing them to appoint an umpire, whose award shall be final.

In as much as the parties have undertaken not to manufacture in each others' territories they are not to purchase any patent for each others' territories, except after having given the party

interested in the manufacture in the country in question the right of pre-emption on the same terms as the patent is offered to them.

Transitory

This agreement is made subject to ratification by the 31st August, 1897. Mr. Eugene duPont, Mr. Bernard Peyton, Mr. Addison Fay and Mr. Hamilton Barksdale have undertaken to recommend and advocate such ratification by the American Factories, which is to be notified to Mr. E. Kraftmeier, of 55 Charing Cross, London, S. W. (telegraphic address—"Kraftmeier, London"), so as to be in his possession by the 31st August, 1897, and Mr. Thomas Reid, Mr. J. N. Heidemann, Mr. Max A. Philipp and Mr. E. Kraftmeier will recommend and advocate such ratification by the European Factories, which is to be notified to Mr. Eugene duPont so as to be in his possession by the 31st August, 1897.

EXHIBIT XXII.

THE INTERNATIONAL ALUMINUM AGREEMENT.¹

The A. J. A. G. Agreement of September 25, 1908.

About September 25, 1908, the defendant Aluminum Company of America, acting through the Northern Aluminum Company, of Canada, which is entirely owned and controlled by defendant, entered into an agreement with the so-called Swiss or Neuhausen Company, of Europe, which is the largest of the European companies engaged in the aluminum industry and designated in this agreement as "A. J. A. G.," parts thereof material to this action being as follows:

2. The N. A. Co. agree not to knowingly sell aluminum, directly or indirectly, in the European market.

¹United States of America v. Aluminum Company of America. In the District Court of the U. S. for the Western District of Pennsylvania. Petition in Equity, pp. 15-16.

The A. J. A. G. agree not to knowingly sell aluminum, directly or indirectly, in the American market (defined as North and South America, with the exception of the United States, but including West Indies, Hawaiian and Philippine Islands).

4. The total deliveries to be made by the two companies shall be divided as follows:

European market, 75% to A. J. A. G., 25% to N. A. Co.

American market, 25% to A. J. A. G., 75% to N. A. Co.

Common market, 50% to A. J. A. G., 50% to N. A. Co.

The government sales to Switzerland, Germany and Austria-Hungary are understood to be reserved to the A. J. A. G.

The sales in the United States of America are understood to be reserved to the Aluminum Company of America.

Accordingly the A. J. A. G. will not knowingly sell aluminum, directly or indirectly, to the U. S. A., and the N. A. Co. will not knowingly sell, directly or indirectly, to the Swiss, German and Austria-Hungarian governments.

5. The N. A. Co. engages that the Aluminum Company of America will respect the prohibitions hereby laid upon the N. A. Co.

Said agreement became effective October 1, 1908, and provided that it should "last until terminated by a six months' written notice," and petitioner avers that said agreement became effective and has been continuously since said date, and is now, in full force and effect, unless terminated by notice.

EXHIBIT XXIII.

INTERNATIONAL DYE-STUFF AGREEMENT.¹

Agreement made the 30th day of November, one thousand nine hundred and sixteen, between E. I. duPont de Nemours & Company, of Wilmington, U. S. A., a company incorporated in the state of Delaware, in the United States of America (hereinafter called the "duPont Co."), of the one part, and Levinstein, Limited, of Manchester, a company incorporated under the British Companies Acts (hereinafter called "Levinsteins"), of the

¹Congressional Record, June 3, 1920, pp. 8991-2.

other part: Whereas the duPont Co. and Levinsteins are respectively interested in the manufacture and sale of dyes and are desirous of co-operating for the purpose of such manufacture and sale, and with that object desire to obtain each from the other the right to use as hereinafter provided the patented inventions and secret processes owned or to be acquired by the other party for the manufacture and sale of finished dyes (including synthetic indigo), intermediates and raw material necessary for and used in such manufacture:

Now, it is hereby agreed as follows:

1. The parties hereto will communicate to each other all such information as they now possess or control and are at liberty to furnish in connection with the manufacture of dyes, intermediates and raw materials, including particulars of all patented or secret processes as aforesaid and particulars of all apparatus, machinery and plant necessary for such manufacture, with liberty to each party to visit the works of the other party and to inspect all processes coming within the object of this agreement carried on by the parties, respectively; but neither party is to be required, except by his consent, to give to the other any rights or information concerning intermediates or raw materials used for military purposes, or the manufacture of explosives.

2. The parties shall be entitled to the following rights in respect of all patented inventions and secret processes mentioned in Clause I hereof, videlicet:

(a) Levinsteins shall have exclusive rights for the use, manufacture and sale under its own and the duPont Co's patented inventions and secret processes throughout Great Britain, Ireland, India and all British possessions, colonies and dependencies (except Canada), France, Italy, Spain, Belgium, Holland, Portugal, Switzerland, Denmark, Norway and Sweden, and non-exclusive rights throughout Canada and all other countries except those for which the duPont Co. is to have exclusive rights.

(b) The duPont Co. shall have exclusive rights for the use, manufacture and sale under its own and Levinstein's patented inventions and secret processes throughout the United States of America and all its possessions, present

and future, Mexico and Central and South America, and non-exclusive rights throughout all other countries except those for which Levinsteins is to have exclusive rights.

3. If the information to be furnished under Clause 1 by Levinsteins, to the duPont Co. shall be capable of turning out finished products of the standard of the products from time to time sold by Levinsteins and if the synthetic indigo produced by such processes shall be up to the commercial standard heretofore ruling in the United States, the duPont Co. shall pay to Levinsteins twenty-five thousand pounds in each of the ten years from the first July, one thousand nine hundred and seventeen, to the first July, one thousand nine hundred and twenty-seven, the first payment to be made on the first July, one thousand nine hundred and eighteen. The condition for such payment shall be deemed conclusively to be performed if Levinsteins shall at their works produce finished products and synthetic indigo of the before mentioned standards and shall prove that they furnished the duPont Co. with the information and instruction necessary to produce the same, whether in fact the duPont Co. are or are not able to produce the same or do or do not produce the same.

4. Each party agrees that if hereafter during the continuance of this agreement it shall make or acquire any patented invention or secret process coming within the terms of this agreement it will disclose in writing to the other party immediately, or in any event within three months thereafter, full particulars in respect thereof, and thereafter furnish to the other party whenever and so often as the other party shall request copies of all claims, specifications, applications and patents in respect of any such patented invention and copies of all writing setting forth any such secret process and such further information as the other party shall request in respect of the same or otherwise relating to the inventions and processes the subject of this agreement.

5. Whenever the duPont Company shall have disclosed a patented or secret process to Levinsteins as aforesaid the duPont Company shall thereupon give notice in writing to Levinsteins that they may obtain a license (exclusive or non-exclusive as the

case may be) to use the same within the countries specified in Clause 2 hereof. Whenever Levinsteins shall have disclosed a patented or secret process to the duPont Company as aforesaid Levinsteins shall give notice in writing to the duPont Company that they may obtain similar licenses to use the same within the said countries.

6. The royalties payable under any such license as is referred to in the preceding clause by the party accepting the license shall be five per cent. on the selling value of the finished product delivered in the country of manufacture. In the case of a patented invention the royalty shall not be payable beyond the existence of the patent, and in the case of a secret process shall be payable only during the continuance of this agreement. The royalties payable to Levinsteins under this clause shall be additional to the twenty-five thousand pounds a year mentioned in Clause 3 hereof.

7. In any notice given as aforesaid the party disclosing such patented invention or secret process shall request the other party to elect within a period expiring three months after service of such notice whether such other party accepts a license for the invention or process set forth in the notice and the other party shall elect within said period whether it accepts such license. In default thereof such license shall be deemed not to have been accepted.

8. Each of the parties to whom any such license as aforesaid shall have been granted may grant, within the limitations of such license, sub-licenses in respect thereof to any or all of its respective subsidiary or allied companies (or to any other persons by mutual consent); but every such sub-license shall be subject to all the terms and conditions contained in the grant of the license so sub-licensed and shall also contain terms, conditions and obligations requiring such sub-licensee to do such acts as may be necessary or proper to enable the party granting such sub-license to observe all the terms and conditions and to perform all the obligations on its part contained in the grant of the license so sub-licensed. No such sub-license in respect of any such license shall be granted by any sub-licensee, nor by any of the parties

party, to assist in defending any letters patent under which any licenses shall have been granted as herein provided, and for that purpose to furnish to such other party all information and evidence in its power.

14. Each of the parties hereto agrees, whenever and so often as requested by the other party, to execute all such other instruments in writing as may be necessary or proper for the purpose of further assuring and confirming the grant of any license as herein provided, or for the purpose of enabling such grants to be filed or recorded in any public office.

15. If any difference or dispute shall arise between the parties hereto in respect of this agreement or any matter or thing relating thereto, the same shall be referred to the president for the time being of the duPont Company or his nominee, and the chairman for the time being of Levinsteins or his nominee who shall arbitrate the same, and whose award shall be final. If, however, the said arbitrators shall fail to agree, they shall appoint an umpire, whose award shall be final, which umpire, if the question or matter to be decided relates to a patented invention or secret process of Levinstein's, shall be an American, and if the question or matter to be decided relates to a patented invention or secret process of the duPont Company, shall be an European. If said president and chairman fail to agree as to the appointment of such umpire, then such umpire, if required as hereinbefore provided to be an European, shall be appointed by the president for the time being of the Law Society of England, or if required as hereinbefore provided to be an American, shall be appointed by the president for the time being of the Association of the Bar of the City of New York.

16. The benefits and obligations of this agreement shall inure to and be binding upon the parties hereto and their respective legal representatives and successors but shall not be assignable by either party without the consent in writing first obtained from the other party, but such consent shall not be requisite in the case of any assignment of the whole or greater part of the undertaking of either party.

17. This agreement shall terminate on the first July, one

thousand nine hundred and twenty-seven, but unless six months' written notice shall have been given by either party to the other prior to the first July, one thousand nine hundred and twenty-seven, or prior to first July in any subsequent year, it shall continue in force from year to year thereafter.

E. I. DUPONT DE NEMOURS & COMPANY,
By J. Amory Haskell, *Vice-President*.

For and on behalf of LEVINSTEIN, LIMITED,
John B. Zornsdale, *Chairman*,
Herbert Levinstein, *Managing Director*.

EXHIBIT XXIV.

METHODS OF COMPETITION DECLARED UNFAIR BY THE FEDERAL TRADE COMMISSION.¹

"Among the methods of competition thus far condemned by the Commission may be mentioned the following:

Misbranding of fabrics and other commodities respecting the materials or ingredients of which they are composed, their quality, origin or source.

Adulteration of commodities, misrepresenting them as pure or selling them under such names and circumstances that the purchaser would be misled into believing them to be pure.

Bribery of buyers or other employees of customers and prospective customers to secure new customers or induce continuation of patronage.

The payment of bonuses by manufacturers to salesmen of jobbers and retailers to procure their special services in selling their goods; and making unduly large contributions of money to associations of customers.

Procuring the business or trade secrets of competitors by espionage, by bribing their employees, or by similar means.

Procuring breach of competitors' contracts for the sale of products by misrepresentation or by other means.

Inducing employees of competitors to violate their contracts or enticing away employees of competitors in such numbers or under such circumstances as to hamper or embarrass them in business.

Making false or disparaging statements respecting competitors' products, their business, financial credit, etc.

The use of false or misleading advertisements.

Making vague and indefinite threats of patent infringement suits against the trade generally, the threats being couched in such general language as not to convey a clear idea of the rights

¹See U. S. Federal Trade Commission. Annual report, 1920, pp. 56-57.

alleged to be infringed, but nevertheless causing uneasiness and fear in the trade.

Widespread threats to the trade of suits for patent infringement arising from the sale of alleged infringing products of competitors, such threats not being made in good faith but for the purpose of intimidating the trade.

False claims to patents or misrepresenting the scope of patents.

Intimidation for the purpose of accomplishing enforced dealing by falsely charging disloyalty to the Government.

Tampering with and misadjusting the machines sold by competitors for the purpose of discrediting them with purchaser.

Trade boycotts or combinations of traders to prevent certain wholesale or retail dealers or certain classes of such dealers from procuring goods.

Passing off of products or business of one manufacturer for those of another by imitation of product, dress of goods, or by simulation of advertising or of corporate or trade names.

Unauthorized appropriation of the results of a competitor's ingenuity, labor and expense, thereby avoiding costs otherwise necessarily involved in production.

Preventing competitors from procuring advertising space in newspapers or periodicals by misrepresenting their standing or other misrepresentation calculated to prejudice advertising mediums against them.

Misrepresentation in the sale of stock of corporations.

Selling rebuilt machines of various descriptions, rebuilt automobile tires, and old motion-picture films slightly changed and renamed as and for new products.

Harassing competitors by fake requests for estimates on bills of goods, for catalogues, etc.

Giving away of goods in large quantities to hamper and embarrass small competitors; and selling goods at cost to accomplish the same purpose.

Sales of goods at cost, coupled with statements misleading the public into the belief that they are sold at a profit.

Bidding up the prices of raw materials to a point where the

business is unprofitable for the purpose of driving out financially weaker competitors.

Loaning, selling at cost, or leasing for a nominal consideration pump and tank outfits to dealers on condition that they be used only for the distribution of the product of the particular manufacturer. Loans or leases of other equipment under similar conditions.

The use by monopolistic concerns of concealed subsidiaries for carrying on their business, such concerns being held out as not connected with the controlling company.

Intentional appropriation or converting to one's own use of raw materials of competitors by diverting shipments.

Giving and offering to give premiums of unequal value, the particular premiums received to be determined by lot or chance, thus in effect setting up a lottery.

Any and all schemes for compelling wholesalers and retailers to maintain resale prices on products fixed by the manufacturer.

Combinations of competitors to enhance prices, maintain prices, bring about substantial uniformity in prices, or to divide territory or business."

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